

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-1424

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P/S

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

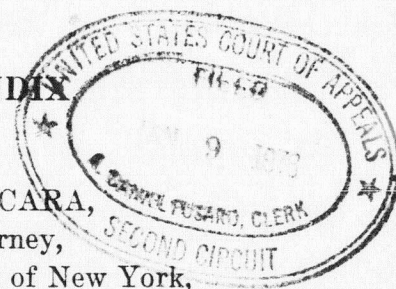
v.

RAY JONES,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

GOVERNMENT'S APPENDIX

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
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Buffalo, New York 14202.



EDWARD J. WAGNER,
Assistant United States Attorney,
of Counsel.

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INDEX.

	page
Proceedings before the Court on 7-11-77, outside the presence of the jury; regarding the availability of the Government informer.....	1
Selected portions of <u>Voir Dire</u> , 7-12-77, regarding prospective jurors Kimball and Tadak.....	5
Proceedings before the Court on 7-12-77, outside the presence of the jurors; regarding the availability of the Government informer.....	46
Selected portions of the direct examination of Detective Petronella, at trial.....	57
Judge Elfvin's ruling on defendant's Motion for Acquittal.....	82-A
Proceedings before the Court on 7-20-77, outside the presence of the jury; regarding the avail- ability of the Government informer.....	83
Prosecutor's Summation, 7-20-77.....	85
Judge Elfvin's instructions to the jury; 7-20-77...	123
Selected portion of Judge Elfvin's discussion with the jury during deliberations, 7-20-77....	173

**Proceedings before the Court on 7-11-77, outside the
presence of the jury; regarding the availability
of the Government informer.**

Proceedings before the Court on 7-11-77, outside the
presence of the jury; regarding the availability
of the Government informer.

31

everything on the record that you are
complaining of.

MR. COSTA: Well, I'm not complaining, your Honor.

THE COURT: No, but you may.

MR. COSTA: I'm just saying there may be certain
areas that you feel are not necessary and
I think they are, if I feel they are, maybe
it might better serve the interest of the
selection process if I were to submit some
of these questions in advance and let you
get an idea of what --

THE COURT: If you want to do that, it's all right
and I will be apprised and not surprised.

MR. COSTA: Thank you, your Honor.

MR. WAGNER: Your Honor, Mr. Riley is the informant
that was involved in this case, and Mr. Costa
has asked to have an opportunity to talk
to him.

THE COURT: You gave two names, Riley and somebody
else.

MR. WAGNER: Mr. Gray, was involved with the agents
but he was not involved in this particular
case.

THE COURT: I see. Just Mr. Riley.

MR. WAGNER: Mr. Riley. He's here. Mr. Costa is

2

Proceedings before the Court on 7-11-77, outside the
presence of the jury; regarding the availability
of the Government informer.

welcome to interview him if he would like.

I offered Mr. Costa earlier to use our
offices because they were more comfortable
I felt, more comfortable than a lot of other
places and I felt that that was the case.
And he's welcome to do that today.

MR. COSTA: Today, now?

MR. WAGNER: He is here now.

MR. COSTA: Well, it was my understanding that
what we had tried to do is --

MR. WAGNER: I am not saying that he will be here
other times. I am saying he is here now.

MR. COSTA: I see.

MR. WAGNER: If it's a bad time for him perhaps
we can agree on another time.

THE COURT: Is it a bad time, Mr. Costa?

MR. COSTA: Well, your Honor --

THE COURT: Simply a yes or no.

MR. COSTA: I really can't make that assessment. I
have got a seven o'clock appointment. I don't
know how long it will take.

THE COURT: You would prefer, I gather, to have
another time such as on Wednesday or something
like that.

THE COURT: Well, I would like to talk to him for a

Proceedings before the Court on 7-11-77, outside the
presence of the jury; regarding the availability
of the Government informer.

33

moment or two in the Government's presence
or without their presence.

THE COURT: Go ahead. Mr. Wagner is amenable.

MR. COSTA: Mr. Ginsberg, will you please give
me a card or something so I will know --

THE COURT: I am sure he is not going to say if
you take just one minute now that that is
going to be it or anything like that.

* * * * *

I hereby certify that this record is
true and accurate transcript from the
stenographic notes in this proceeding.

Edna J. Parnell
Official Reporter
U.S. District Court

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES,

-v-

CR.-77-46



RAY JONES,

Defendant.

Proceedings of Voir Dire of Prospective
Jurors held before the HON. JOHN T. ELFVIN, United States
District Judge, in Part II, United States Court House,
Buffalo, New York, on July 12, 1977.

APPEARANCES:

RICHARD J. ARCARA, United States
Attorney,
by EDWARD J. WAGNER, Assistant United
States Attorney.

PETER COSTA, Esq., and
BARRY COHEN, Esq.,
Attorneys for the Defendant.

VOIR DIRE

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 PROCEEDINGS: July 12, 1977, 11:35 a.m.

2 APPEARANCES: As before noted.

3

4

(Defendant present.)

5

6 THE COURT:

7

All right. The next case is
Criminal 77-46, United States against
Ray Jones.

8

9

Mr. Jones is here, is he?

10

MR. COSTA:

Yes, your Honor.

11

THE COURT:

12

And, Mr. Costa, you take your
seat, if you would, and Mr. Cohen,
you will be assisting Mr. Costa?

13

14

MR. COHEN:

Yes, your Honor.

15

THE COURT:

All right.

16

Is this Mr. Wagner's case?

17

MR. WAGNER:

Yes, your Honor.

18

THE COURT:

19

All right. Ladies and gentlemen,
as I have indicated, this case is
United States against Ray Jones, and
the particular context and background
in this case lies in the area of
food stamps and Mr. Jones is charged
with some wrong doing in that connection,
and again, of course, the charges

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WESTERN DISTRICT OF NEW YORK

6-A

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 against Mr. Jones are absolutely
2 meaningless at this point except they
3 are the vehicle - the charges bringing
4 the case into Court and they tell Mr.
5 Jones what he is charged with and, of
6 course, the Government has the full
7 burden of proving the case. Mr. Jones
8 is seated at the table to your right
9 and has his back to you, he is in the
10 grey suit. His attorney is the gentleman
11 in the blue suit nearest to me at that
12 table, Mr. Peter Costa, and he is
13 assisted by the gentleman in the middle
14 Mr. Barry Cohen. The Government is
15 represented by Assistant United States
16 Attorney Edward Wagner who is the
17 gentleman in the center of the room
18 who just stood. Now, again we will be
19 seating on the same basis as we have
20 done in the case selection we have
21 just ended and we will be looking for
22 the same type of general information
23 but this time we, of course, will want
24 to know if there is anything in and
25 around and about the matter of food

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6-B

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 stamps, whether someone, you, or anyone
2 in your family or close friends have
3 had experiences with it and whether you
4 have had any particular bad feelings
5 one way or the other. I think it is
6 fair to state also that the events,
7 the particular episodes and criminal
8 act with which Mr. Jones is charged
9 occurred February 25 and February 28
10 of 1977, and those, of course, are
11 merely allegations and have to be
12 proved by the Government but obviously
13 from that all of you know that that
14 places it in the immediate aftermath
15 of our blizzard conditions here in the
16 City of Buffalo. So again we may have
17 some particular feelings arising out
18 of that that you will want the attorneys
19 to know.

20 All right, fill the box.

21 CLERK: Juror number 526, Stella Sobierajski.

22 DEPUTY MARSHALL: Juror number 1.

23 CLERK: Juror number 527, Stella Sobierajski.

24 Juror number 479, Toufie Karam.

25 DEPUTY MARSHALL: Juror number 2.



Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 BY THE COURT:

2 Q Now, concerning this matter of food stamps, is there
3 anything as to that that leaves you bias or prejudiced,
4 Mrs. Kimball?

5 A No.

6 Q And do you have any trouble with going along with
7 the concepts of presumption of innocence and the
8 fact that the Government has to prove its case beyond
9 a reasonable doubt and Mr. Jones has no obligation
10 to put in any evidence and take the witness stand
11 himself?

12 A No, I don't.

13 Q You have no problems with that?

14 A No.

15 Q And, Mrs. Horowitz, you have not had any jury
16 experience except that --

17 A (PJ 7) One case which --

18 Q You came here and you were on one in front of me?

19 A Which finished May the 25th.

20 Q And you have a very good memory.

21 A Thank you.

22 Q And that was the case involving the bringing in of
23 the alien?

24 A Right.

25 Q And you heard my instructions and you deliberated and

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1 Q You haven't read anything about it or formed any
2 view about it?

3 A No.

4 Q Have you got a view about these particular kinds of
5 cases and the accusations that are being made by
6 the Government in the form of what we call an
7 indictment?

8 A I haven't really formed an opinion about it.

9 Q Mrs. Kimball, --

10 A (PJ 6) Yes.

11 Q -- I assume you had some discussion or had some
12 awareness of this particular kind of accusation
13 through the media?

14 A Oh yes, and I'm very strong against it.

15 Q Fine. Now, naturally all of us should be concerned
16 about any claim of illicit activity. What we are
17 concerned about, of course, is every one of us has
18 views, there's nothing wrong with that and there is
19 nothing wrong with having an opinion, however, when
20 we get to serve as a juror it's a very heavy and
21 important responsibility --

22 THE COURT: Ask the question.

23 MR. COSTA: I'm trying to, your Honor.

24 BY MR. COSTA:

25 Q Now, you have some strong --

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 THE COURT: You are a good lawyer, you know
2 how to ask questions.
3 MR. COSTA: Thank you, your Honor.
4 BY MR. COSTA:
5 Q You think it will affect your ability to be fair
6 and impartial?
7 A No, I could be very impartial but I would like to
8 tell you that I'm strongly against it.
9 Q Against --
10 A Getting it illegally or unfairly.
11 Q Fine. Do you think that that would affect your
12 ability here to make a final judgement as to whether
13 or not --
14 A I don't know if it would or not.
15 Q You have some doubt about it?
16 A I have.
17 Q We won't press it any further. Thank you. Thank
18 you for your candidness and your honesty.
19 Miss Horowitz, --
20 A (PJ 7) Yes.
21 Q -- you have heard some of the general questions I
22 have been asking about the media information about
23 this kind of accusation. Have you come to a point
24 in viewing this kind of circumstance so that you have
25 formed an opinion?

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 faulty in some aspect of the case --

2 THE COURT:

Now, the jury will be told, Mr.
3 Costa, that one of their burdens, of
4 course, in evaluating the case and
5 whether the Government has proved
6 each and every element beyond a reason-
7 able doubt will be, first of all, to
8 decide whether the witnesses are
9 believable and credible and what weight
10 should be assigned to the particular
11 evidence, and I think you can ask if
12 they will follow that instruction.

13 BY MR. COSTA: —

14 Q Well, I join in his Honor's admonition to you and
15 I assume that you will follow what his Honor has
16 just repeated to you, each and every one of you
17 will follow that?

18 Mr. Weiss, you seem a little hesitant.

19 A (PJ 11) I'll do that.

20 Q All right. Now, the defense in this particular case
21 is that an undercover agent and a paid police
22 informant enticed Mr. Jones to purchase the stamps
23 which, of course, the receipt of is illegal. Now,
24 I need your assurance that if you are selected as
25 a juror you will attentively follow the evidence in

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Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1
2 this case as to ascertain whether the crime charged
3 was in fact initiated by a law enforcement official
4 or someone acting for that law enforcement official
5 for personal profit and benefit. In other words,
6 will each and every one of you give consideration
7 to our defense in this consideration legally called
8 entrapment or government misconduct and that the
9 government approached us through a paid informant
10 and asked us, in effect, to buy the stamps. Will
11 you consider that, Mrs. Sobierajski?

12 A. (PJ 1) I don't understand.

13 THE COURT:

14 Well, what I would tell the
15 jury, of course, once there is any
16 indication in the case that such
17 might be possible then I would tell
18 the jury that the Government had a
19 burden to prove that there was a
20 disposition on the part of Mr. Jones
21 to engage in this activity and that
22 he did not get pushed into it or
23 enticed into it solely because -
24 solely or mainly because of the Govern-
25 ment activities, that will be part of
the Government's proof. I will tell
you that if you are not satisfied that

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Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

the Government has so proved that
element of the case that you must
acquit the Defendant.

All right.

BY MR. COSTA:

Q Well, do you understand what his Honor has told you?

A (PJ 1) Yes.

Q Well, if that turns out to be the circumstances would
you have any hesitancy of accepting that defense?

A If they can prove it I'll accept it.

Q Well, let's not get confused here. Apparently either
I have done something to confuse you or I have asked
the question to confuse you. You see, it's not up
to us to prove that we're innocent, it's up to the
Government to prove --

THE COURT:

What I said is, and I will just
repeat it, if there is in the case
some indication to me that this could
well be an element in the case that
there might be some entrapment I would
then further explain to you that the
Government along with proving all the
other elements in the case would have
to prove that there was not entrapment,
that there was a prior disposition and

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Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

U willingness on the part of Mr. Jones
to engage in this allegedly illegal
act and that he was not enticed into
it or entrapped into it, does that
clarify it?

PJ 1: Yes, yes. Now I understand it
now.

BY MR. COSTA:

Q Now that his Honor has explained it to you would you
have any hesitancy of accepting that as part of the
defense in this matter that we were, in affect,
enticed, allured, charmed into buying these stamps
illegally?

A (PJ 1) No, I wouldn't.

Q You would have no problem in applying that?

A No.

Q Mr. Karam, --

A (PJ 2) Yes.

Q -- you have heard his Honor's explanation and my
weak attempt in trying to clarify it, do you think
you would have any difficulty accepting that proposi-
tion, I don't say proposition, I mean that particular
statement?

A No, I wouldn't.

Q Miss Falkiewicz?

- 1 A (PJ 3) No.
- 2 Q Mr. Starkweather?
- 3 A (PJ 4) No.
- 4 Q Mrs. Ermer?
- 5 A (PJ 5) No.
- 6 Q Mrs. Kimball?
- 7 A (PJ 6) No.
- 8 Q Miss Horowitz?
- 9 A (PJ 7) No.
- 10 Q Mr. Bell?
- 11 A (PJ 8) No problem.
- 12 Q Mrs. Hitzel?
- 13 A (PJ 9) No.
- 14 Q Mrs. Brown?
- 15 A (PJ 10) No problem.
- 16 Q Mr. Weiss?
- 17 A (PJ 11) It's hard for me to answer that.
- 18 Q Well, do you want me to ask you some further questions?
- 19 Let me maybe go in this direction. If the Court
- 20 instructs you that a person with no predisposition
- 21 to commit a crime cannot be convicted for unlawful
- 22 possession of food stamps if the deal was initiated
- 23 by a police agent, will you follow that principal
- 24 of law?
- 25 A Yes, if that's the law then I'll follow the law.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 Q In other words, if you are being told that this deal
2 got started and we didn't go looking for the deal,
3 they came to us and told us, "Here, buy them.", and
4 so on, and so forth that it was Government contraband
5 that was involved?

6 A If the law --

7 MR. WAGNER: Your Honor, --

8 THE COURT: Excuse me.

9 MR. WAGNER: Your Honor, I don't mind Mr.

10 Costa going into the defense of
11 entrapment as long as he articulates
12 it very well, and I think that the last
13 discussion may have been a gloss of
14 the entrapment defense and I don't
15 think it was a proper statement of it,
16 and I would object to it.

17 THE COURT: This is the danger, of course, of
18 going into details. I have explained
19 to the jury satisfactorily what at this
20 juncture the defense of entrapment would
21 comprise, and what it does mean, to
22 reiterate, is that one is entrapped if
23 he or she would not have committed the
24 crime except for the intervention, the
25 activity of the Government Agent and

14
Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

70

1 the person had no predisposition or
2 willingness to do that sort of crime.
3 Now, if you find that to be so then
4 that would mean that the person had
5 been entrapped, and I would tell you
6 that if you were so satisfied that the
7 Government had not proved beyond a
8 reasonable doubt that there was no
9 entrapment then you would have to
10 acquit.

11 BY MR. COSTA:

12 Q Do you understand that now?

13 Mr. Nicholas?

14 A (PJ 12) Yes.

15 Q Now, do each of you believe that each and every
16 citizen, including yourselves, are entitled to the
17 same rights and protection afforded by the United
18 States Constitution and there are certain instances
19 where police conduct falls below those levels?

20 THE COURT: That is an area that I don't want
21 you to get into.

22 MR. COSTA: I'm sorry, your Honor. I had no
23 prior admonition.

24 THE COURT: I understand.

25 MR. COSTA: If you will excuse me for a minute,

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 I just want to ask his Honor a question.

2 May I have a recess?

3 THE COURT: We will take a recess at this time,
4 ladies and gentlemen, and all of you
5 may go and come back at two o'clock,
6 I think that will give you sufficient
7 time to get something to eat and stretch
8 your legs and come back at two o'clock
9 and we will resume.

10
11 (Jury escorted from the courtroom.)

12
13 (Luncheon recess taken at 1:16 p.m.)

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Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 PROCEEDINGS: July 12, 1977, 2:04 p.m.

2 APPEARANCES: As before noted.

3

4

(Defendant present.)

5

6

(Prospective Jurors present.)

7

8

THE COURT: Proceed, Mr. Costa.

9

BY MR. COSTA:

10 Q While I have the opportunity I will go into another
11 matter which was mentioned briefly by the U. S.
12 Attorney as concerning possible future witnesses
13 that may be testifying on behalf of the Defendant.
14 I only say may be testifying because many times an
15 attorney makes a judgement or assessment as to
16 whether to put on a certain witness providing what
17 the people or the prosecution or the U. S. Attorney
18 puts on, but they may testify. I cannot give you
19 an assurance that they will, it will depend upon
20 what we call the flow of the proof: Carmel Jones,
21 Michael Barton or Bob Barton, Bill Jay or William
22 Jay, Russell Baker, Ann Klenck, Leo Buckley, Bob
23 Boyle, Cliff Bell, Len Cowell or Lee Smith.
24 Now, if those names mean anything to you or you
25 are familiar with them or have some social or business

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16

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prospective jurors Kimball and Tedak.

1 or other contact with them then it is your responsibility
2 to tell us so we may determine whether or not that
3 relationship may in some way possibly affect your
4 ability to be a fair and impartial juror not only
5 to the accused, Mr. Jones the Defendant, but also,
6 of course, to the United States Government who is
7 being represented by Mr. Wagner.

8 I see no evidence of recognition so I will assume
9 you do not know any of these people. Thank you.

10 I am going to address a general proposition to you.
11 Can you accept the fact that if there is a considerable
12 degree of Government participation in a supposed
13 criminal action that even some possible predisposition
14 does not constitute a crime on the part of the
15 Defendant?

16 THE COURT: I don't think that is the law,
17 Mr. Costa.

18 MR. COSTA: Well, then I withdraw it and I
19 stand corrected. Excuse me.

20 BY MR. COSTA:

21 Q His Honor will tell you to strike that from your
22 mind, and I presume that he will do that and I do
23 that too. I believe his Honor has gone into the
24 question of dealing with the testimony of a police
25 officer, that it should be treated as if he did not

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 have a uniform on because naturally when they come
2 to court most of them will not have a uniform on
3 and they are to be evaluated like any other witness.
4 I assume you accept that, and if there's any mis-
5 statement that you will take that into consideration
6 on the question of reasonable doubt. Each and every
7 one of you accept that, I have your assurance if you
8 are selected?

9 While his Honor was questioning you I tried to make
10 careful notes and I will ask certain selected
11 witnesses certain specific questions - not witnesses -
12 I'm sorry, you're not a witness, you may be a witness
13 to what is going on, but you're not a witness -
14 certain selective questions. Now, Mr. Karam, have
15 you ever been the victim of a crime?

16 A (PJ 2) No.

17 Q Miss Falkiewicz, have you ever been the victim of a
18 crime?

19 A (PJ 3) No.

20 Q Mr. Starkweather, have you ever been the victim of
21 a crime?

22 A (PJ 4) No.

23 Q Mrs. Ermer?

24 A (PJ 5) Not that I'm aware of.

25 Q All right, that's a unique answer. Mrs. Kimball?

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Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 A (PJ 6) No, sir.
- 2 Q Miss Horowitz?
- 3 A (PJ 7) No.
- 4 Q Mr. Bell?
- 5 A (PJ 8) No.
- 6 Q Mrs. Hitzel?
- 7 A (PJ 9) No.
- 8 Q Mrs. Brown?
- 9 A (PJ 10) No, sir.
- 10 Q Mr. Weiss?
- 11 A (PJ 11) No.
- 12 Q Mr. Nicholas?
- 13 A (PJ 12) No.
- 14 Q Has anyone ever been sued or sued anybody for any
- 15 reason or brought cause for any reason or made a
- 16 claim against anybody for any reason?
- 17 Now, his Honor did touch on this but I would like
- 18 to get maybe a little clarification. In relation
- 19 to what he called law enforcement activity he talked
- 20 also about District Attorney officers and U. S.
- 21 Attorney officers or any agency which is concerned
- 22 with the law, whether it's what we call law enforcement
- 23 or whether it might be the State Attorney General's
- 24 office, and a Consumer Fraud Bureau, there's all kinds
- 25 of activities that the Government is concerned with

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 and what we lawyers recognize as law enforcement
2 activities but I would like to clarify that for you
3 if I might, anybody here have any friends, relatives?
4 A (PJ 9) You mean with the Federal or --
5 Q Any law -- Besides your husband in the Police
6 Department?
7 A My son is a lawyer.
8 (PJ 6) My brother and my nephew.
9 Q Yes, of course, FAA and Federal contracts?
10 A Right.
11 Q What and where does he practice?
12 A (PJ 9) Up in Buffalo. He just passed the bar in
13 February, he's just starting now.
14 Q Have you had opportunity to discuss with your son
15 either your jury service or the defense of cases
16 or --
17 A No.
18 Q Have you discussed law with him at anytime about
19 presumptions or reasonable doubt or anything of that
20 sort?
21 A He's married and I don't, you know, --
22 Q Fine, thank you. I think his Honor touched upon it
23 but I would like to re-emphasize it, I am sure each
24 of you jurors considers the duty of being a juror
25 as being a very solemn and important responsibility,

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 you are going to give it the necessary energy that
2 that kind of responsibility takes?

3 MR. COSTA: Thank you.

4 THE COURT: Mr. Wagner, are you going to
5 challenge any of the jurors for
6 cause?

7 MR. WAGNER: I am not for the Government,
8 your Honor.

9 THE COURT: Mr. Costa.

10 MR. COSTA: Well, I would, your Honor. I
11 would like to discuss it in the
12 absence of the jury.

13 THE COURT: Step to the sidebar.

14
15 (Sidebar conference had off the
16 record between Court and counsel.)

17
18 THE COURT: Mr. Weiss, Juror Number 11, and
19 Mr. Starkweather, Juror Number 4, I
20 am going to ask you to step down just
21 because of the relatively strong
22 inherent feelings that each of you has
23 expressed in the case. I will be
24 drawing one more jury today and if
25 you will come back at three o'clock

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

that will suffice.

(PJ 11 and PJ 4 excused.)

MR. COSTA:

Mr. Wagner.

(Sidebar conference had off the
record between Court and counsel.)

MR. COSTA:

Well, your Honor, I would like
to ask a question of you before I
exercise my challenges.

THE COURT:

All right.

(Sidebar conference had off the
record between Court and counsel.)

MR. COSTA:

Your Honor, we will excuse Jurors
Number 1, 3, 5, 6 and 9.

I'm sorry, I made a mistake, it's
number 10, Mrs. Brown not Mrs. Hitzel.

THE COURT:

Instead of who?

MR. COSTA:

Mrs. Brown, number 10 instead of
9, Mrs. Brown I wanted to excuse.

Thank you very much, Mrs. Brown.

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WESTERN DISTRICT OF NEW YORK

By the Court:

1 A (PJs 1, 2, 3, 5, 6, 10) No.

2 Q Also, Mr. Jones has no obligation to put in any
3 evidence, he doesn't have any obligation to take the
4 witness stand in his own behalf, Mr. Costa has
5 indicated that he probably will take the witness
6 stand but if he does not that you are not to draw
7 any inference from that of his being guilty of
8 thinking he has something to hide because he doesn't
9 take the witness stand, are you troubled with that
10 concept at all?

11 I have also indicated and Mr. Costa has indicated
12 there might be a question of whether Mr. Jones was
13 entrapped in this, whether he not having any prior
14 disposition or willingness to engage in something
15 illegal along these lines was nevertheless coerced
16 and urged into it by a Government Agent, and I would
17 tell you that the Government would have the burden
18 of showing that there was not any such entrapment
19 and if the Government fails to do that, if the
20 Government fails to satisfy you beyond a reasonable
21 doubt that there was not entrapment would you have
22 any reluctance in saying, "Mr. Jones, you're innocent,
23 you're not guilty."?

24 No problem in that regard.

25 THE COURT: All right, Mr. Wagner.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 BY MR. WAGNER:

2 Q Did either of them apply for food stamps, if you
3 know?

4 A No. My daughter, she's seventeen.

5 Q Was she working at the time or going to school?

6 A No, going to school.

7 Q Have you ever in the past gotten food stamps or
8 been on public assistance?

9 A Years ago.

10 Q About how many years ago?

11 A A long time ago.

12 Q Over ten years ago?

13 A Yes.

14 Q I'm not concerned about that. Do you have any
15 general feelings about that Food Stamp Program?

16 A No.

17 Q Either the general program or the blizzard program?

18 A No.

19 Q You haven't drawn any conclusions one way or the
20 other?

21 A No, I haven't.

22 MR. WAGNER: I have nothing else. Thank you.

23

24 BY MR. COSTA:

25 Q Now, his Honor dwelt to some extent about the question

**Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.**

1 of entrapment and what that meant and he used some
2 terminology which I'm sure that when it comes time
3 to the charge in the case he will give you the
4 specifics of it, he's just trying to give you a
5 general idea of it now, do you understand that
6 what the actual law is concerning this particular
7 aspect of this claim, criminal activity, he will
8 give you specifically at that time. Now we're
9 just giving a broad area, in generality, to get
10 some familiarity into your minds, do you understand
11 that, Mr. Collier?

12 A (PJ 1) Yes, sir.

13 Q So that not that I take exception to his Honor's
14 remarks but the actual law you will hear when the
15 case begins. Now, I'm going to try to avoid repeat-
16 ing certain questions but before I forget I want to
17 read the names of the possible witnesses that may
18 appear because I think Miss Hensel indicated she
19 might know one of the people: Carmel Jones, Mike or
20 Michael Burton - Barton, Bob Barton, Bill Jay,
21 Russell Baker, Ann Klenck, Leo Buckley, Bob Boyle,
22 Cliff Bell, Len Cowell, Lee Smith.

23 A (PJ 5) I thought you said Mary Smith.

24 (PJ 2) I know an Ann Klenck, she lives out in Blasdell.

25 Q She sells real estate.

By Costa: Selected portions of *Voir Dire*, 7-12-77, regarding prospective jurors Kimball and Tedak.

1 A Oh yes.

2 Q A lot of people don't understand that principal.

3 A I don't know if I understand it right either now.

4 Q Here is the principal, I hope I'm saying it correctly,
5 a person may have committed something which was wrong,
6 morally wrong or even basically wrong, but because of
7 certain elements in the case, in this particular case
8 the defense of entrapment, that you have got to find
9 him not guilty --

10 THE COURT: What it comes down to is this,
11 that this crime like all other crimes
12 is proven when certain elements which
13 make up the crime are proven and there
14 must be other factors that enter in
15 each crime and I would tell you what
16 the elements are that make up this
17 particular crime and the Government
18 then has to prove beyond a reasonable
19 doubt to your satisfaction each one of
20 those elements. Now, in addition, it
21 may well be in this case, it probably
22 will be, that I will add to it that the
23 Government must prove that there was
24 not entrapment, that also would be an
25 element. If the Government fell short

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 on any one of those elements I would
2 tell you that you would have to say
3 that Mr. Jones is not guilty, that is
4 what Mr. Costa is talking about.
5 Would you have any reluctance in that
6 situation of acquittal?

7 PJ 3: No.

8 BY MR. COSTA:

9 Q Even though you're not passing upon whether he's
10 innocent or not, no problem?

11 A (PJ 3) No problem.

12 Q What kind of crimes were those that you had to parti-
13 cipate in deliberating --

14 THE COURT: He said he did not remember.

15 BY MR. COSTA:

16 A (PJ 3) I just don't remember. One was a theft, I
17 believe, and the other two I just don't remember anymore.

18 Q It was three crimes that you sat on?

19 A Two. I was on three but the other one was an accident
20 case.

21 Q All right. You told us about that, --

22 A Yes.

23 Q -- I understand that. But I'm talking about the
24 criminal situation?

25 A I don't remember just what they were now.

by Court:

27

- Selected portions of *Voir Dire*, 7-12-77, regarding prospective jurors Kimball and Tadak.

1 A No.

2 Q And I guess that's the aspect of that. Have you been
3 involved in any criminal prosecution?

4 A No, sir.

5 Q Is there anything about the food stamp business that
6 has involved you or leaves you with some strong
7 feeling one way or the other?

8 A No.

9 Q And, Mr. Tadak, what do you do, sir?

10 A (PJ 6) I work for the U.S. Post Office.

11 Q And what station do you work at?

12 A I work at the Main Post Office.

13 Q How long have you been with them?

14 A Seven years.

15 Q What do you do there?

16 A I work in the building maintenance.

17 Q In what?

18 A Building maintenance.

19 Q I forgot to ask you, Mr. Varecka, whether Mrs.
20 Varecka is employed outside the home?

21 A (PJ 3) At present, no.

22 Q Pardon?

23 A At the present time, no, your Honor.

24 Q How long has it been since she worked?

25 A Five months.

Selected portions of *Voir Dire*, 7-12-77, regarding,
prospective jurors Kimball and Tedak.

- 1 Q And what had she done?
- 2 A She worked for the same company as I.
- 3 Q And, Mr. Tadak, is your wife employed outside the
- 4 home?
- 5 A (PJ 6) No, she isn't.
- 6 Q Have you been on jury service, sir?
- 7 A I've been with Erie County.
- 8 Q How long ago?
- 9 A Oh, about seven years.
- 10 Q And more than one case?
- 11 A I wasn't on no cases, your Honor.
- 12 Q You just sat in the bull pen?
- 13 A Yes.
- 14 Q You have not really been on a jury at all then, right?
- 15 A No, your Honor.
- 16 Q And do you have any relatives or close friends who
- 17 are in police work?
- 18 A Yes, I do.
- 19 Q And who and what do they do?
- 20 A I have a cousin that's a State Trooper and a friend
- 21 whose father is in the Sheriffs Department.
- 22 Q Your State Trooper cousin, is he stationed here in
- 23 this area?
- 24 A He's stationed at Orchard Park Barracks.
- 25 Q Are you very close to him that you see him socially?

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 A I see him once in a while.
- 2 Q Do you discuss his work with him at all?
- 3 A No, we don't.
- 4 Q Does that have any influence on you so far as your
5 predisposition in a case or tending to believe a
6 law enforcement witness more than if you did not
7 have this relationship?
- 8 A No.
- 9 Q What about the friend, what does he do?
- 10 A His father is in the Sheriff's Department.
- 11 Q What is his name?
- 12 A Eddie Miller.
- 13 Q This is the name of the fellow who is in the Sheriff's
14 Department?
- 15 A Yes, that's his father.
- 16 Q Do you know his position there?
- 17 A No, I don't.
- 18 Q Now, are you at all close to the father?
- 19 A Well, I'm close to his son but most of the time his
20 father is there when I'm there.
- 21 Q Is this a neighbor or some social --
- 22 A A good friend.
- 23 Q And arising out of what?
- 24 A Well, I help his son out in his business.
- 25 Q So because of that you became friendly with the father

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 and with the son? U
- 2 A Yes.
- 3 Q Now, there will be one or more witnesses in the case
- 4 who are members of the Erie County Sheriffs Department,
- 5 would the fact that you have this friendship with a
- 6 father, son, the father which is in the Erie County
- 7 Sheriffs Department, is that going to have you leaning
- 8 in their direction, in the Government's direction in
- 9 this case? ✓
- 10 A No, your Honor.
- 11 Q If Mr. Wagner falls short on any one of these elements
- 12 that I have talked about and does not prove one or
- 13 more of them beyond a reasonable doubt including this
- 14 aspect of entrapment would you have any reluctance
- 15 of saying Mr. Jones is not guilty?
- 16 A No, your Honor. ✓
- 17 Q And would you be at all embarrassed in talking with
- 18 your friend and your friend's father and have to
- 19 explain to them how you came to be on a jury that
- 20 acquitted somebody?
- 21 A No.
- 22 Q Particularly when the Sheriffs' people might be involved
- 23 in the prosecution? ✓
- 24 A No.
- 25 Q All right. Would it tend to have you believe the

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 witness more than if you did not have that relation-
2 ship?

3 A No, your Honor.

4 Q Is there anything in the Food Stamp Program that -
5 any particular experience that gives you any bias
6 or prejudice?

7 A Well, during the snow storm I was a little disgusted
8 because I didn't receive it, that I couldn't receive
9 the food stamps but everybody else received them.

10 Q You thought it was sort of an unwarranted give away
11 but can you accept the fact that this was legally
12 done and it was a Government program and you don't
13 agree with the program but nevertheless it was legal.

14 A Right.

15 Q Now, what Mr. Jones is charged with here is having
16 illegally acquired some stamps, would you be able to
17 put aside your thinking on the general program and
18 decide from the evidence whether or not Mr. Jones
19 is guilty?

20 A I think so.

21 THE COURT: All right, Mr. Wagner.

22 BY MR. WAGNER:

23 Q Gentlemen, Mr. Varecka, did you get food stamps as
24 a result of the blizzard?

25 A (PJ 3) Yes.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 Q What were the circumstances, did you miss work?
- 2 A Yes.
- 3 Q How much time did you miss?
- 4 A Six days.
- 5 Q And you missed pay, I take it?
- 6 A Yes.
- 7 Q Now, when you went for the stamps did you apply for
8 yourself and your family?
- 9 A Yes.
- 10 Q How many are in your household?
- 11 A Five.
- 12 Q That's your wife and --
- 13 A And three children.
- 14 Q And what are the approximate ages of those children?
- 15 A 17, 13 and 11.
- 16 Q Now, was your wife also eligible for food stamps,
17 do you know?
- 18 A I don't know.
- 19 Q That is did she miss work because of the blizzard?
- 20 A Yes.
- 21 Q Did she go and get them too, do you know?
- 22 A Just myself.
- 23 Q Did you have any particular problems applying for them?
- 24 A No.
- 25 Q As a result of that did you have any particular feelings

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 either way about the Food Stamp Program?
- 2 A No.
- 3 Q Any attitude that it's about time that you got your
- 4 share, or anything like that?
- 5 A No. It could be run a little different though.
- 6 Q What do you mean by that?
- 7 A More efficient.
- 8 Q And why do you say that?
- 9 A Your lines and your waiting period.
- 10 Q You found that unpleasant, I take it?
- 11 A Yes.
- 12 Q How long did you have to wait in line?
- 13 A Over four hours.
- 14 Q Well, I can understand that, I guess. What about the
- 15 program itself, the Food Stamp Program itself,
- 16 any basic feelings about that?
- 17 A They should be given to the needy.
- 18 Q You have that feeling.
- 19 A Yes.
- 20 Q By the way, sir, have you ever gotten food stamps
- 21 in the past or public assistance?
- 22 A No.
- 23 Q Any other feelings about the Food Stamp Program you
- 24 would like to discuss?
- 25 A No.

1 Q Do you think that you have any feelings that would
2 make you feel unpleasant sitting as a juror in a
3 case where a man is charged with a crime or illegally
4 acquiring food stamps?

5 A No.

6 Q Anybody in your family or yourself ever charged with
7 a crime?

8 A No.

9 Q Mr. Tadak, anybody in your family or yourself ever
10 charged with a crime?

11 A (PJ 6) No.

12 Q Now, you said you were not eligible for stamps, is
13 that right?

14 A Right.

15 Q Why was that?

16 A Because I was working.

17 Q You got paid?

18 A I got paid for three days and the other two days I
19 had to take out of my vacation.

20 Q Had you ever been eligible for or received food
21 stamps in the past?

22 A No.

23 Q How about any other public assistance?

24 A No.

25 Q As a result of not being eligible to get food stamps

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 and a large number of people were do you have some
2 bad feelings about the program?

3 A Well, yes, when I saw a doctor or a lawyer getting
4 them I was wondering how come I couldn't get them.

5 Q Do you think that that experience which gave rise
6 to that feeling you have now, would make you feel
7 uncomfortable being on a jury where a man is charged
8 with a crime?

9 A No. ✓

10 Q Why do you say that, sir?

11 A I feel funny about the food stamps. Everybody can
12 afford to get them like I know a few people that was
13 getting them and they could buy the food, and they
14 were receiving the food stamps.

15 Q Anything else that you want to say to us about that?

16 A No.

17 Q Do you think that if instructed by Judge Elfvin about
18 the elements of this particular offense that you could
19 follow his instructions fairly and honestly? ✓

20 A I think so.

21 Q Do you think you could take the general feeling you
22 had about the Food Stamp Program and put them aside
23 and listen to this case alone?

24 A Yes. ✓

25 Q Do you think, sir, if you were influenced at all you

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WESTERN DISTRICT OF NEW YORK

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 would be tending to feel in the Government's favor
2 or the Defendant's favor, either way?

3 A It depends.

4 Q I'm sorry?

5 A It depends.

6 Q Why would that be?

7 A I don't know. It depends. I got that feeling with
8 the food stamps.

9 Q Would you tend, sir, to think that if a fellow can
10 get them he should get them?

11 A A person that's eligible should get them, the ones
12 that isn't shouldn't get them.

13 Q Okay, I have nothing else for you. Thank you very
14 much.

15 THE COURT: Mr. Costa.

16
17 BY MR. COSTA:

18 Q Mr. Varecka, have either you or any member of your
19 family ever made a claim against anybody or anybody
20 make a claim against you?

21 A (PJ 3) No.

22 Q Have you ever engaged an attorney to represent your
23 legal interest?

24 A No.

25 Q Do you own your own home?

1 principal that we have the right to assert the
2 defense of entrapment even though what we did was
3 in a figurative sense might be considered wrong?

4 A I believe so.

5 Q And would you be willing to bring in a verdict of
6 not guilty if the people better known as the United
7 States Attorney's office did not establish beyond a
8 reasonable doubt that we were not entrapped?

9 A Yes.

10 Q That's almost like a double negative, do you understand
11 that?

12 A Yes.

13 Q And even though you would not come to the question
14 of innocence but because of this one factor or other
15 factors in the case that you would be compelled to
16 abide by the law and bring in a verdict of not guilty?

17 A Yes.

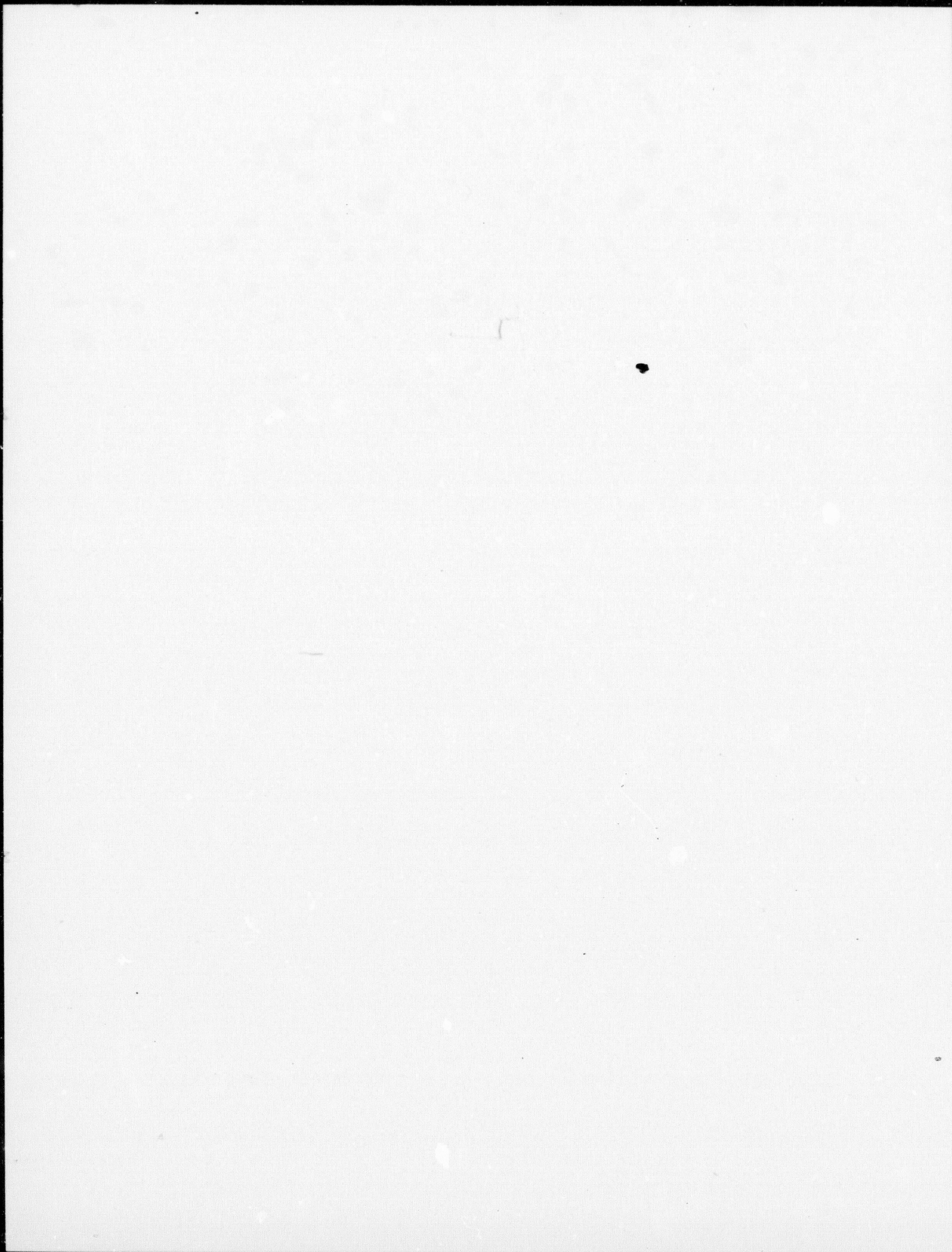
18 Q And it wouldn't bother you?

19 A Like I say, I would have to listen to the evidence
20 first on both sides before I could form an opinion.

21 Q And if his Honor gives you the law which would
22 require that kind of a verdict you would not hesitate
23 in the least?

24 A I don't think so.

25 Q Could you understand that you would be abiding by the



By Costa:

1 Q I'm just asking you, if the evidence doesn't measure
2 up, if it measures up of course you have the responsi-
3 bility.

4 A That's right.

5 Q Do you think we have taken a lot of time here today
6 unnecessarily?

7 A No, I don't.

8 Q Mr. Tadak, --

9 A (PJ 6) Yes.

10 Q -- do you think all doctors and lawyers got food
11 stamps?

12 A I don't know if all the doctors and lawyers got them.

13 Q Do you know of any that have gotten some yourself?

14 A Well, the way I heard --

15 Q Well, I didn't ask you that. Do you know of any
16 doctor or lawyer who got food stamps?

17 A I don't know.

18 Q You don't know if that's true?

19 A I don't know.

20 Q Well, is this what you read about in the newspapers?

21 A Well, on the t.v. and newspapers.

22 Q Did they give you any cases or any names on t.v.
23 or in the newspapers of any doctors and lawyers that
24 got them?

25 A No.

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WESTERN DISTRICT OF NEW YORK

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 Q Well, the television and the radio and newspapers
2 have also mentioned some items here about the people
3 who are accused of illegally obtaining stamps, I'm
4 sure you read about it, it's been in the newspapers
5 for weeks, have you read about that?

6 A Yes.

7 Q And have you got an opinion about the people who got
8 accused of this situation? ✓

9 A No.

10 Q Well, didn't you feel a little bit annoyed that some
11 people were getting food stamps and you weren't getting
12 them?

13 A Right.

14 Q Well, how did that make you feel about a fella who
15 is accused of buying the stamps from a Government
16 Agent, have you got any opinion? ✓

17 A No, I don't.

18 Q You haven't formed any view at all about his responsi-
19 bility or lack of responsibility under the law, is
20 that what you're telling us?

21 A Yes.

22 Q What caused you to be disgusted?

23 A Well, I figure I was entitled too, so.

24 Q Well, do you feel that --

25 A I was no different than they. I was off too, I lost

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 time off from work.
- 2 Q Did you apply for the stamps?
- 3 A I went down in line one day and I didn't go down the
4 next day --
- 5 Q Well, did you --
- 6 A -- because there was no sense in standing there.
- 7 Q I'm sorry, sir. Did you get interviewed?
- 8 A No, I didn't.
- 9 Q Was there a long wait that you didn't wait until
10 they got to you?
- 11 A No, because I had to go away the one time when I was
12 there.
- 13 Q Well, do you think it was because you were ineligible
14 that you didn't get the stamps or because you just
15 didn't have the time?
- 16 A Well, I didn't have the time to wait that long in
17 line and when I got half way they said they're
18 closing the door so there's no sense in going there
19 anymore.
- 20 Q Have you ever sued anybody?
- 21 A No.
- 22 Q Has anyone ever sued you or any member of your family?
- 23 A No.
- 24 Q Do you remember what kind of a case you sat on seven
25 years ago?

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 A I didn't sit on no cases.
- 2 Q I'm sorry. It was you didn't get selected?
- 3 A Right.
- 4 Q Did you get the opportunity to sit in what we call
- 5 the jury box?
- 6 A No.
- 7 Q You never even were asked questions in this manner?
- 8 A I was asked by the lawyers, you know, if I was involved
- 9 in an accident, and I was in an accident in sixty-three
- 10 and they just --
- 11 Q They excused you because you had been involved in an
- 12 accident?
- 13 A Right.
- 14 Q This question about being a juror, do you understand
- 15 it's a heavy responsibility? ✓
- 16 A Yes, I do.
- 17 Q And you're going to be willing to give it the time
- 18 and attention that's required to hear all the evidence
- 19 and the law of the case and to reserve the time
- 20 necessary to do that? ✓
- 21 A Yes.
- 22 Q Do you have any quarrel with the questions that his
- 23 Honor gave to you about the constitutional rights
- 24 people have?
- 25 A No. ✓

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 Q There's got to be something wrong, he's here in the
2 court room, he's accused of something and therefore
3 he did something wrong, do you agree with that that
4 he did something wrong by virtue of the fact that
5 he's accused, do you think that's right?

6 A No.

7 Q Pardon me, I didn't hear your answer, sir.

8 A No.

9 Q He is still presumed innocent, you accept that?

10 A I don't know until I hear the case.

11 Q Do you think that Mr. Jones has got to prove to you
12 that he's innocent?

13 A I think so.

14 Q You think he's got to prove that to you?

15 A Yes.

16 Q Even though his Honor said to you that he is presumed
17 to be innocent?

18 A Yes.

19 Q Do you understand my question? Maybe I'm a little
20 confused.

21 THE COURT: The point is, Mr. Tadak, I would
22 instruct you that this Defendant Mr.
23 Jones is presumed innocent, that even
24 though he has been charged he sits
25 here as an innocent man and will

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 continue to sit that way until the
2 Government has put in all of its
3 evidence, until you have heard the
4 two attorneys argue, you have heard
5 me give you the instructions on the
6 law, until after you have gone down-
7 stairs and deliberated and have come
8 to a unanimous verdict that he is
9 guilty, all the way through that he
10 is innocent, now, do you have any
11 trouble with that concept?

12 PJ 6: No, your Honor.

13 BY MR. COSTA:

14 Q So he doesn't have to prove to you that he's innocent,
15 right?

16 A Right.

17 Q Thank you. You haven't heard of any of the witnesses
18 who may be called in the case?

19 Do you remember the names that I called out?

20 A (PJ6) No.

21 Q How about you, Mr. Varecka?

22 A (PJ 3) No.

23 Q Have you always worked for the Post Office Department,
24 Mr. Tadak?

25 A (PJ 6) I worked for them for seven years and I worked -

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 well, and, you know, the Buffalo Special Police.

2 Q You did work for the Buffalo Special Police?

3 A Yes. Well, I was working the desk part time.

4 Q On the desk for the Buffalo Special Police?

5 A No. I worked for a detective agency as the Buffalo
6 Special Police you know, gin mills, dances, bingo.

7 Q You worked as a law enforcement person?

8 A Right.

9 Q How long did you do that?

10 A I did it for thirteen years.

11 Q Ever have any desire to go into professional police
12 work?

13 A I tried to.

14 Q You weren't eligible because of certain --

15 A On account of my eyes.

16 Q Do you like being a police officer?

17 A Yes, sir.

18 Q You enjoyed it?

19 A Yes, sir.

20 Q Now, there's going to be police officers who are
21 going to be in and out of uniform testifying in this
22 case or connected with the law process. Do you think
23 that because of your admiration of this kind of work
24 or your desire to be in this kind of work that you
25 might have a strong tendency to want to accept what

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 they say and not accept what might be offered by
2 either cross examination or witnesses produced on
3 behalf of the Defendant?

4 A No.

5 Q Pardon me?

6 A No, sir.

7 Q I mean --

8 A It depends.

9 Q What depends?

10 A When I hear the case, both sides, then I will, you
11 know, decide.

12 Q Thank you, sir.

13 Q You're welcome.

14 THE COURT: Is there any challenge of Mr.
15 Varecka or Mr. Tadak for cause, Mr.
16 Wagner?

17 MR. WAGNER: Not by the Government, your Honor.

18 THE COURT: Mr. Costa.

19 MR. COSTA: Yes, your Honor.

20
21 (Sidebar conference had off the
22 record between Court and counsel.)

23
24 THE COURT: Your fifth challenge, Mr. Wagner.

25 MR. WAGNER: I'll waive my challenge, your Honor.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tadak.

1 THE COURT: The ninth challenge, Mr. Costa.
2 MR. COSTA: We'll excuse Mr. Tadak.
3 Thank you very much.
4 THE COURT: Thank you, Mr. Tadak. Don't
5 leave the building, Mr. Tadak, I have
6 one more case unfortunately.
7
8 (PJ 6 excused.)
9
10 CLERK: Juror number 515 John Robinson.
11 DEPUTY MARSHALL: Juror number 6.
12 CLERK: Juror number 515 John Robinson.
13
14 BY THE COURT:
15 Q Now, Mr. Robinson, where do you work?
16 A (PJ 6) Chevy Tonawanda.
17 Q Chevy Tonawanda. How long have you been there, sir?
18 A Seven years.
19 Q What do you do there?
20 A Repairman, Tools.
21 Q You repair tools?
22 A No. Well, tool --
23 Q Pardon me?
24 A When they come down the line they may have a hole
25 in them, something like that.

1 either innocent or responsible for what they're being
2 accused of?

3 A. No.

4 Q I believe his Honor asked you if you or any member of
5 your family was ever a victim of a crime?

6 A. No.

7 Q Any problem with accepting the principal that it
8 can be that Mr. Jones did something which is not
9 exactly right but it's not yet illegal?

10 A. Accepting it?

11 Q That it is not illegal because he was, in a sense,
12 entrapped into this circumstance and that the
13 Government sold him the stamps through a Government
14 Agent, buy the stamps at a discount and that because
15 he did that now the Government is accusing him of
16 doing something illegal and if the Government induced
17 him to do this thing it's called entrapment and there-
18 fore he's innocent?

19 MR. WAGNER: Your Honor, again I'm going to
20 ask Mr. Costa if he's going to discuss --

21 THE COURT: I think that I have told them
22 pretty clearly what the law is on the
23 matter and what the burden of proof
24 of the Government would be.

25 MR. COSTA: Your Honor, I'm trying to elicit

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 from the potential juror whether or
2 not he would have any difficulty in
3 finding a verdict of not guilty if
4 these were the circumstances.

5 THE COURT: If the Government failed to carry
6 the burden of proof that there was no
7 entrapment I would instruct Mr. Robinson
8 and the others that they would have to
9 acquit the Defendant. Under those
10 circumstances would you have any reluc-
11 tance in doing it?

12 PJ 6: No.

13 BY MR. COSTA:

14 Q Are you going to require the Defendant to take the
15 stand and to prove his innocence?

16 A No.

17 Q He may take the stand but if he doesn't you won't
18 in any fashion or manner hold that against him?

19 A No.

20 Q You're going to decide the case on the evidence that
21 comes from the witness box and the law given to you
22 by his Honor?

23 A Yes.

24 Q What kind of work did you do at Morrison Steel?

25 A I worked as a Press Operator.

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

- 1 evidence in this case and listening to what I tell
2 you about the case and what the law is?
3 A No.
4 Q And then coming to a decision in this case regardless
5 of what the newspaper said?
6 A No.
7 Q You have no trouble?
8 A No.
9 Q All right. And as I have discussed I will tell the
10 jury what the elements of the crime are, what Mr.
11 Wagner must prove, and one of those will be that
12 there was no entrapment and Mr. Jones was not led
13 into or urged into this on the part of the Government
14 or that he had a predisposition or that he did have
15 a predisposition to commit this particular crime.
16 Now, if Mr. Wagner proves that there was this predisposi-
17 tion or that there was no urging that he proves that
18 beyond a reasonable doubt and he proves all of the
19 other elements would you have any reluctance to find
20 Mr. Jones guilty?
21 A Well, I only thought a person is innocent until he's
22 proven guilty.
23 Q Right. And if Mr. Wagner proves his case would you
24 have any reluctance to say that he had done so and
25 that Mr. Jones is guilty?

Selected portions of *Voir Dire*, 7-12-77, regarding
prospective jurors Kimball and Tedak.

1 A No.

2 Q And if, on the other hand, he falls down on any one
3 of these elements and doesn't prove any one of them
4 that he doesn't prove beyond a reasonable doubt would
5 you have any reluctance in saying that Mr. Jones is
6 not guilty?

7 A No.

8 Q And is there anything in the Food Stamp Program
9 itself that makes you prejudiced?

10 A No.

11 THE COURT: You may ask, Mr. Wagner.

12

13 BY MR. WAGNER:

14 Q I'll be very brief with you. You or any members of
15 your family ever been charged with a crime?

16 A No.

17 Q Now, did you get food stamps as a result of the
18 blizzard?

19 A My father did.

20 Q Your father did?

21 A Yes.

22 Q Where was it that he was working at the time?

23 A Trico.

24 Q And did he include you as a dependent when he went?

25 A Yes.

Proceedings before the Court on 7-12-77, outside the presence of the jurors; regarding the availability of the Government informer.

Proceedings before the Court on 7-12-77, outside the 201
presence of the jurors; regarding the availability
of the Government informer.
you want me to --

1
2 THE COURT:

No, it's perfectly all right as
3 long as you don't pick up a whole
4 string of cases that mean nothing
5 and cause me a lot of work.

6 MR. COSTA:

Oh no, no, no, your Honor. I
7 operate on this theory, find two or
8 three good cases, that's enough, don't
9 burden the Judge with a lot of showing
10 your scholarship because you have found
11 fifty cases, that's unnecessary.

12 THE COURT:

Well, we will read the cases, what--
13 ever you hand in.

14 MR. WAGNER:

Your Honor, one thing for the
15 record if I could, I would like the
16 record to reflect yesterday I delivered
17 to Mr. Costa a copy of the criminal
18 record of James Riley the informant.

19 MR. COSTA:

Well, your Honor, there is one
20 problem with that. Mr. Riley -- Mr.
21 Wagner did do that. Unfortunately
22 neither Mr. Wagner nor anybody associated
23 with the Sheriffs Department who
24 delivered it to him can interpret it.
25 Now, I have asked him if he could assist

Proceedings before the Court on 7-12-77, outside the 202
presence of the jurors; regarding the availability
of the Government informer.
us --

1

2

THE COURT:

Is it in a different form than we
usually get?

3

4

MR. WAGNER:

Yes, it's in the New York State
Criminal Division whatever, it comes
out in some kind of a computer printout.
I not only showed the copy I had to
Mr. Costa but I made a photocopy for
him. Most of it he can understand, I
believe. There are some areas that are
grey but he's welcome to compare my
copy.

5

6

7

8

9

10

11

12

MR. COSTA:

Your Honor, the problem is inter-
pretation.

13

14

THE COURT:

Can't you go over to the Sheriffs
Department and ask them what this or
that or the other means?

15

16

17

MR. COSTA:

Well, here's the problem, your
Honor. These Nices things, unfortunately
I've had some experience with them so
we've had in affect an indication -
here's the problem, your Honor, I
show it to you, first of all, it's
illegible but that's not his problem,
he didn't create --

18

19

20

21

22

23

24

25

Proceedings before the Court on 7-12-77, outside the 203
presence of the jurors; regarding the availability
of the Government informer.

1 THE COURT: Illegibility Mr. Wagner said he
2 solved, he will let you compare this
3 with his copy.

4 MR. COSTA: Yes, right, but that's not the
5 real question. The real question is
6 that we don't know what happened.
7 There are certain, in affect, charges
8 that have been made against this
9 particular individual and there's no
10 disposition. Now, we don't know whether
11 they are still pending or whether he was
12 convicted, serving time, and, of course,
13 arrests as such --

14 THE COURT: Here I see six months probation,
15 three years, dismissed, dismissed,
16 dismissed, not arraigned, --

17 MR. COSTA: Go down the other -- I'm not
18 saying -- We get that problem in some
19 instances so I assume that I will get
20 the cooperation of the Sheriffs Depart-
21 ment in interpreting this thing because
22 I had a problem with the alleged
23 informant yesterday.

24 THE COURT: What did you have with him?

25 MR. COSTA: Well, the Government made him

Proceedings before the Court on 7-12-77, outside the 204
presence of the jurors; regarding the availability
of the Government informer.

1 available but apparently either at the
2 behest of Mr. Petronella or some other
3 source he won't talk to us, he won't
4 tell us anything, he won't give us any
5 assistance whatsoever.

6 MR. WAGNER: Well, I'll object to the --

7 THE COURT: Has he been told not to talk, Mr.
8 Wagner?

9 MR. WAGNER: Your Honor, I'll state for the
10 record that I explicitly personally
11 told Mr. Riley that he was free to talk
12 to Mr. Costa, and in fact I may have
13 done that in Mr. Costa's presence in
14 my office, and that's only because Mr.
15 Costa brought Mr. Riley down to see me,
16 I told him that he was free to speak
17 to him, that he could tell him anything
18 and for as long as he wanted and that
19 my office and the Sheriffs Office were
20 giving him absolutely no direction as
21 to whether he wanted to talk to the
22 Defendant's attorney.

23 THE COURT: As long as you have not applied
24 the negative there is nothing you can
25 do about it. You can't tell him to talk.

Proceedings before the Court on 7-12-77, outside the 205
presence of the jurors; regarding the availability
of the Government informer.

1 MR. COSTA: I didn't say that but Deputy
2 Petronella interrupted my conversation
3 with him and asked him, "Jimmy, do you
4 want to go home, why don't you go home
5 with me, come on, I'll take you home."
6 and I was trying to talk to Mr. Riley.
7 THE COURT: Yesterday admittedly it was going
8 to be - in fact, you said yourself
9 all you might do is just say hello to
10 him --
11 MR. COSTA: That's right, sir.
12 THE COURT: -- and at a later time you wanted
13 to talk to him.
14 MR. COSTA: Yes, we were going to make arrange-
15 ments with Mr. Wagner to speak with
16 him in the library with my client present.
17 Now, he won't talk to us. He said he
18 will come to the trial but obviously
19 I think that this is unduly and severely
20 limiting --
21 THE COURT: I haven't heard anything that
22 smacks of wrongdoing or out of line.
23 Now, you say that Mr. Petronella said,
24 "Come on, let's go home.", but certainly
25 yesterday was --

Proceedings before the Court on 7-12-77, outside the
presence of the jurors; regarding the availability
of the Government informer.

1 MR. COSTA: He also told him not to talk to me.

2 THE COURT: -- yesterday was not set up on
3 any basis that the interview was going
4 to occur then.

5 MR. COSTA: No.

6 THE COURT: Mr. Wagner had suggested that it
7 could be and it could be arranged, and
8 you yourself said no. all you wanted to
9 do at that time was just speak with him
10 very briefly --

11 MR. COSTA: That's right, your Honor.

12 THE COURT: -- and the interview would be
13 later so how can you object because
14 Mr. Petronella goes along with that
15 same idea and says, "Let's go.".

16 MR. COSTA: Well, no, I don't except that I
17 would like to have him brought in so
18 that we can talk to him without the
19 presence of Mr. Petronella who apparently
20 has some influence or persuasive ability
21 as to what he can or can't or should
22 or shouldn't say.

23 THE COURT: Well, that is up, of course, to
24 Mr. Riley. If Mr. Riley will not talk
25 unless Petronella is there then you have

Proceedings before the Court on 7-12-77, outside the presence of the jurors; regarding the availability of the Government informer. 207

1 got a semi-refusal to talk. If Mr.
2 Petronella is the one who is saying,
3 "No, you can't talk unless I'm here.",
4 then you have got a semi-negative
5 instruction by the Government which
6 can apply. Now, I don't know which it
7 is.

8 MR. COSTA: We were also told yesterday that
9 the other informant was not involved
10 in this case.

11 THE COURT: I was here when Mr. Wagner told
12 you that.

13 MR. COSTA: I would like to know what arrange-
14 ments can be made to at least bring Mr.
15 Riley in according to our understanding
16 with Mr. Wagner.

17 MR. WAGNER: The arrangements are very simple,
18 we will agree on a time and we'll have
19 him in. All I can do is have him here. ✓
20 I can't tell him to talk, I can't make
21 him talk, and if he decides he wants to
22 go home with his ride the Agent I can't
23 prevent that.

24 MR. COSTA: Well, your Honor, I would like to
25 Mr. - Deputy Petronella not present

Proceedings before the Court on 7-12-77, outside the
presence of the jurors; regarding the availability
of the Government informer.

208

1 because I don't think it's proper for
2 him to be present when we're talking
3 to the informant.

4 THE COURT: If he's in the room ask him to
5 step out. If Mr. Riley won't talk to
6 you under those circumstances I can do
7 nothing about it.

8 MR. COSTA: Well, that's not the point, your
9 Honor. The point is Deputy Petronella
10 should not be there.

11 THE COURT: If Mr. Petronella says, "No, I
12 won't leave.", then you have got a
13 different problem.

14 MR. COSTA: Well, we can avoid all that if he
15 isn't there.

16 THE COURT: Why do you have any right -- He
17 can come down with him, he can bring
18 him back and forth, what is wrong with
19 that?

20 As long as he is not in the room
21 where you are talking to him, isn't
22 that what you want?

23 And that is up to Mr. Riley.

24 MR. COSTA: I would much prefer to eliminate
25 any question of taint, to eliminate any

Proceedings before the Court on 7-12-77, outside the presence of the jurors; regarding the availability of the Government informer. 209

1 question of coercion, to eliminate any
2 question of influence, to eliminate any
3 question of preventing this man if he
4 wants to talk from talking. I doubt
5 very much if he will talk to us. I
6 get the distinct impression from my
7 talking to Mr. Riley and examining of
8 his record that so far as we are
9 concerned, so far as the defense is
10 concerned, Mr. Riley is not going to
11 tell us nothing but he is going to do
12 everything possible to impede whatever
13 information we want to get from him
14 and he's not going to tell us anything
15 but I want the opportunity to question
16 him under such circumstances that he's
17 not subjected to any outside influence.

18 THE COURT:

19 All you can do is arrange that
20 he will come down to the time and place
21 that you and Mr. Wagner will make an
22 arrangement, and if he comes with someone
23 like Mr. Petronella you can ask Mr.
24 Petronella to leave and you can ask Mr.
25 Riley if you may speak to him alone,
and if Mr. Riley says no you have no

Edna J. Parzynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Proceedings before the Court on 7-12-77, outside the presence of the jurors; regarding the availability of the Government informer. 210

place to go. If Mr. Petronella is the one or someone else in the Government is the one who says, "No, Mr. Petronella stays here.", then you do have some avenue for relief.

MR. COSTA: I'll talk to you tomorrow, Ed, about arrangements.

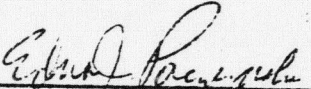
MR. WAGNER: Yes.

MR. COSTA: Thank you.

THE COURT: All right.

* * * * *

I certify that the foregoing is a complete and accurate transcription of my stenotype notes taken herein.


EDNA J. PACZYNSKI, Official Reporter
USDC, WDNY.

**Selected portions of the direct examination
of Detective Petronella, at trial.**

1 A. Only Petronella did.

2 Q. All right. After the 25th have you had any
3 conversations with Mr. Riley concerning the
4 transactions on the 25th?

5 A. No, sir, I don't recall having such a conversation
6 with him.

7 Q. So you never discussed anything with Mr. Riley
8 about what happened on the 25th?

9 A. No, sir.

10 MR. COSTA: Thank you, sir.

11 MR. WAGNER: Your Honor, if Mr. Costa is done
12 I have no further questions for Mr. Shortall.

13 THE COURT: Thank you, Mr. Shortall.
14

15 (Witness Excused)
16

17 THE COURT: Are your witnesses waiting up here,
18 Mr. Wagner?

19 MR. WAGNER: I asked Mr. Petronella to wait in
20 the hallway, but he may have stepped downstairs.
21

22 JOSEPH PETRONELLA, (134 West Eagle
23 Street, Buffalo, New York,) a witness called by and
24 on behalf of the Government, having been first duly
25 sworn, was examined and testified as follows:

Selected portions of the direct examination
of Detective Petronella, at trial.

1 DIRECT EXAMINATION BY MR. PETRONELLA:

2 Q. Mr. Petrone'lla, sir, I would like you to tell
3 the members of the Jury what your occupation is?

4 A. I'm with the Erie County Sheriff's Department
5 assigned to narcotics.

6 Q. Can you describe for the Jury what your particular
7 line of work involves?

8 A. I work undercover.

9 Q. And, approximately, sir how long have you been
10 with the Sheriff's Department?

11 A. Almost six years.

12 Q. And have you been doing undercover work most
13 of that time, sir?

14 A. Yes, I have.

15 Q. Now, Mr. Petronella, sir, in the course of your
16 official capacity with the Sheriff's Office
17 did you become involved with an investigation
18 in the Buffalo area in the spring or late winter
19 of 1977 regarding possible violations of the
20 Federal Food Stamp laws?

21 A. Yes.

22 Q. And in the course of that particular investigation
23 sir, did you use informants with you?

24 A. Yes.

25 Q. I would like you to explain to the jury what you

Selected portions of the direct examination
of Detective Petronella, at trial.

1 mean when you say an informant?

2 A. An informant is a person who helps me in introducing
3 me to people so that I can make a purchase of
4 narcotics or in an undercover capacity pertaining
5 to investigations.

6 Q. These people are not actually employees of the
7 Sheriff's Department?

8 A. No.

9 Q. Can you tell the members of the Jury, please,
10 if a Mr. James Riley was involved with you in
11 the role of an informant?

12 A. Yes, he was.

13 Q. And I would like you to explain also to them
14 what Mr. Riley's position was in this investigation
15 and what arrangements you had with him in return
16 for his cooperation?

17 A. Mr. Riley introduced me to people that were buying
18 food stamps illegally.

19 Q. Did he actually work with you in the field?

20 A. Yes.

21 Q. Did you have a particular arrangement with Mr.
22 Riley at any time about what you would do in
23 return for him for his cooperation?

24 A. That he would be compensated financially, yes.

25 Q. And do you know if Mr. Riley was ultimately

Selected portions of the direct examination
of Detective Petronella, at trial.

1 compensated?

2 A. Yes.

3 Q. And that was the Department of Agriculture
4 money?

5 A. Yes.

6 Q. Do you know how much money Mr. Riley received,
7 sir?

8 A. I believe he received thirteen hundred dollars.

9 Q. Were there any other promises made to Mr. Riley
10 that you know of concerning cooperation, sir?

11 A. No.

12 Q. Were there any charges that were pending against
13 Mr. Riley if you know?

14 A. Not to my knowledge.

15 Q. Any other arrangements with him?

16 A. No.

17 Q. Now, I would like you, sir, to tell us if there
18 were other agents involved from the Sheriff's
19 Office in your investigation of possible food
20 stamp violations?

21 A. Yes, sir, there were.

22 Q. Tell the jury who those people were, please?

23 A. Sergeant Costantino, Detective Mayne, Detective
24 O'Neill, and Detective Costanza.

25 THE COURT: Is that O'-N-E-I-L-L?

Selected portions of the direct examination
of Detective Petronella, at trial.

1 THE WITNESS: Yes.

2 BY MR. WAGNER:

3 Q. Now, Mr. Petronella, I would like you to tell
4 the Jury, sir, if part of your investigation
5 involved a man by the name of Ray Jones?

6 A. Yes.

7 Q. Do you see that man Ray Jones in the courtroom
8 today, sir?

9 A. Yes, sir.

10 Q. Point him out for us, please.

11 A. He's sitting between two counsels in a light
12 beige suit and a brown shirt.

13 MR. WAGNER: Let the record reflect that Mr.
14 Petronella identified the defendant in
15 this case.

16 BY MR. WAGNER:

17 Q. I would like you to tell the Jury, sir, when it
18 was that you first met Ray Jones?

19 A. I met Mr. Jones on the 25th of February for the
20 first time, 1977.

21 Q. And I would like you to describe for them the
22 circumstances leading up to your meeting Mr. Jones?

23 A. The informant --

24 THE COURT: Mr. Riley, you mean?

25 THE WITNESS: Mr. Riley.

Selected portions of the direct examination
of Detective Petronella, at trial.

1 BY MR. WAGNER:

2 A. Mr. Riley and I and another individual pulled
3 up in front of Ray Jones Collision.

4 Q. Were you in a car?

5 A. Yes.

6 Q. Do you recall whose car that was?

7 A. It was a rented car rented through the
8 U. S. Department of Agriculture.

9 Q. Do you know what kind of a car it was?

10 A. It was a red Monte Carlo.

11 Q. And who was with you in that car, as best you
12 recall?

13 A. Myself, Mr. Riley and another informant.

14 Q. Were there any other agents from the Department
15 of Agriculture there at that time?

16 A. Not in my vehicle. They were part of the
17 surveillance team.

18 Q. The other person with you apart from you and
19 Mr. Riley, did he have any specific dealings
20 with this particular defendant?

21 A. No.

22 Q. Now, when you pulled up, sir, in that area
23 I would like you to tell the jury what happened?

24 A. Mr. Riley went into the location, he stood there
25 approximately maybe a minute or so, he walked

1 out and as he walked out, he raised his arm
2 and signalled me to go inside, I left the under-
3 cover vehicle and proceeded into the collision
4 shop.

5 Q. I'm going to show you, sir, what's been marked
6 as Government Exhibit 1 for identification,
7 I would like you to look at that, sir, and tell
8 us if you know what that is?

9 A. Yes. This is a picture of the Ray Jones Collision
10 Service, Incorporated and myself entering the
11 collision shop.

12 Q. So the record is clear, the individual in the
13 picture is you?

14 A. Yes.

15 Q. And what are you wearing in that picture, sir?

16 A. A long fur rabbit coat.

17 Q. Now, Mr. Petronella, as best you can, tell us
18 sir, does that picture depict the scene of
19 Ray Jones Collision Service on or about the
20 time of this transaction we are discussing?

21 A. Yes.

22 Q. I will show you what's been marked as Government
23 Exhibit 2 for Identification, again I would like
24 you to tell the Jury what that is, if you know?

25 A. It's a picture of me in front of Ray Jones Collision

Selected portions of the direct examination
of Detective Petronella, at trial.

1 Service, Incorporated.

2 Q. And again, sir, does that picture, as best you
3 can tell, at this time, accurately depict the
4 scene on or about the transaction we're speaking
5 about?

6 A. Yes.

7 Q. Now, I would like you to tell us, sir, approximately
8 how long, as best you can tell that Mr. Riley
9 was in the shop?

10 A. Maybe approximately eight minutes or so.

11 Q. Could you see where Mr. Riley was?

12 A. He walked into the door, yes, he was standing
13 in the doorway of the collision shop.

14 Q. And you were waiting in the car, is that right,
15 sir?

16 A. Yes.

17 Q. Were there other agents in the vicinity if
18 you know?

19 A. Yes.

20 Q. And where were they, if you know?

21 A. I have no idea.

22 Q. Do you know what their role was being in the
23 area?

24 A. Yes.

25 Q. And what was that?

Selected portions of the direct examination
of Detective Petronella, at trial.

90

- 1 A. One vehicle was to take pictures of the transaction
2 and the other vehicle monitored the audio
3 devices.
4
5 Q. Now, speaking of audio devices, were you wearing
6 or did you have on your possession any type of
7 electronic device at that time?
8
9 A. Yes.
10
11 Q. And what was that, please?
12
13 A. On the first transaction with Mr. Jones, I had
14 a NAGRA on.
15
16 Q. And can you describe what that looked like,
17 what that was like?
18
19 A. Yes. It's a little metal box approximately
20 five and a half to six inches long, approximately
21 three and a half to four inches wide, and
22 approximately one, one and a half inches thick.
23
24 Q. When had you been given that particular device
25 with respect to this transaction?
A. It was given to me by a U. S. Department of
Agriculture Agent, Mr. Jones, and it was placed
on me earlier in the day.
Q. Would you please describe for the Jury how you
wore the device?
A. I -- Can I stand up?
Q. If it would help to describe it, please.

Selected portions of the direct examination
of Detective Petronella, at trial.

1 A. I got the box and I placed it on my side under-
2 neath my pants, and there is a long wire with
3 a microphone that came underneath my shirt,
4 it hooked onto my undershirt, and I had a shirt
5 over that and a heavy sweater so that you couldn't
6 pick up the mike.

7 Q. Did you have the device on, sir, when you
8 encountered Mr. Jones that day?

9 A. Yes.

10 Q. Now, with respect to that particular device,
11 sir, is there a way of turning it on and off?

12 A. Yes.

13 Q. And how is that done?

14 A. You would have to depress a lever, a hammer,
15 and press it down, I believe turn it - push it
16 toward the right and that would turn the machine
17 on.

18 Q. And do you know how to turn the machine off?

19 A. Yes.

20 Q. And how is that done?

21 A. By pressing down on it and pulling it toward
22 the left and that would shut the machine off.

23 Q. Now had you had any experience prior to the 25th,
24 prior to this particular transaction on the 25th,
25 turning that device on and off?

Selected portions of the direct examination
of Detective Petronella, at trial.

- 1 A. Yes.
- 2 Q. Were you familiar with its operation at that time?
- 3 A. Yes.
- 4 Q. Now when Mr. Riley came out of Mr. Jones'
- 5 Collision Service office, did you say he
- 6 signalled you?
- 7 A. Yes.
- 8 Q. Can you describe or show us what he did?
- 9 A. He motioned with his hand for me to go in
- 10 as he was walking out of the door.
- 11 Q. And what did you do?
- 12 A. I left the undercover vehicle and proceeded
- 13 inside the location.
- 14 Q. Now, do you know sir, if the tape recorder
- 15 had been turned on at that point?
- 16 A. Yes.
- 17 Q. How did you turn it on?
- 18 A. By depressing the button and pushing it toward
- 19 the right, I believe.
- 20 Q. I would like you to describe for the jury, sir,
- 21 what happened as you went out to the collision
- 22 shop?
- 23 A. I pre-empted the tape.
- 24 Q. Would you explain to them what you mean by that,
- 25 sir?

Selected portions of the direct examination
of Detective Petronella, at trial.

1 A. I put the date on the tape and the name of the
2 location that I was approaching.

3 Q. Where was Mr. Riley at that time, if you know?

4 A. I believe he was probably entering the undercover
5 vehicle.

6 Q. He had left the shop?

7 A. Yes.

8 Q. Did you have any conversations with Mr. Riley?

9 A. No.

10 Q. What did you do next, sir?

11 A. I entered the collision shop.

12 Q. Did you have a conversation with Mr. Jones, sir,
13 at that time?

14 A. Yes.

15 Q. Do you know, Mr. Petronella, if that conversation
16 was taped?

17 A. Yes, it was.

18 Q. Have you heard the tape, sir?

19 A. Yes.

20 Q. And do you know if a transcript had been made
21 of that tape, sir?

22 A. Yes.

23 Q. Have you listened to the transcript - I'm sorry-
24 have you listened to the tape and read along
25 with the transcript?

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WESTERN DISTRICT OF NEW YORK

70
Selected portions of the direct examination
of Detective Petronella, at trial.

94

- 1 A. Yes.
- 2 Q. As best you can recall, Mr. Petronella, was the
- 3 transcript accurate with respect to what was
- 4 on the tape?
- 5 A. Yes.
- 6 Q. And also as best you can recall, sir, was the
- 7 tape complete and accurate with respect to the
- 8 conversation you had with Mr. Jones that day?
- 9 A. Yes.
- 10 Q. I'll show you, sir, what has been marked as
- 11 Government Exhibit 5 for identification. I will
- 12 ask you, sir, if you can tell us what that is?
- 13 A. This is a transcript of the conversation that
- 14 I had with Mr. Jones on February 25, 1977.
- 15 Q. And have you read that document or a copy of it,
- 16 sir, before coming in today?
- 17 A. Yes, I did.
- 18 Q. And have you compared that to the tape?
- 19 A. Yes.
- 20 Q. You have listened to the tape before coming in
- 21 today?
- 22 A. Yes.
- 23 Q. And how do they compare, sir?
- 24 A. The same.
- 25 Q. Can you tell me, Mr. Petronella, from your

Selected portions of the direct examination
of Detective Petronella, at trial.

1 recollection whether or not the conversation
2 which was taped has any gaps or any absences
3 from what occurred in real life on that day?

4 A. No.

5 THE COURT: No, you can't tell.

6 THE WITNESS: I mean it's exactly what happened
7 that day.

8 BY MR. WAGNER:

9 Q. There is nothing missing?

10 A. No.

11 MR. WAGNER: Your Honor, I would like to and I
12 would feel the best evidence would be to
13 play the tape, but I realize we are
14 approaching the noon hour. Perhaps I
15 could discuss with Mr. Petronella a few
16 matters to take up our time. The electronics
17 man does need a few minutes to set up his
18 equipment.

19 THE COURT: Go ahead.

20 BY MR. WAGNER:

21 Q. Mr. Petronella, we will come back to the conver-
22 sation you had with Mr. Jones. Tell us briefly
23 in your own words what happened at that time?

24 A. I had a conversation with Mr. Jones pertaining
25 to a thousand dollars worth of food stamps, Mr. Jones

Selected portions of the direct examination
of Detective Petronella, at trial.

1 stated to me that he could not handle that
2 many, a thousand dollars worth. The price
3 of the food stamps was discussed between me
4 and Mr. Jones, we agreed upon the figure of
5 five hundred dollars worth of food stamps,
6 at a cost of a hundred and fifty dollars.
7 I counted out the food stamps and handed the
8 food stamps to Mr. Jones and Mr. Jones gave me
9 a hundred and fifty dollars in U. S. currency.

10 Q. Mr. Petronella, the food stamps that you gave
11 Mr. Jones, where did you get them from?

12 A. From the U. S. Department of Agriculture.

13 Q. And that was from whom specifically?

14 A. Mr. Shortall.

15 Q. That's the gentleman who was in here earlier
16 this morning testifying?

17 A. Yes.

18 Q. And the money you got from Mr. Jones, what did
19 you do with that, sir?

20 A. That was turned over to Sergeant Costantino
21 in the presence of Mr. Shortall.

22 Q. Do you know where that money has been kept?

23 A. In the vault at the Narcotics office.

24 Q. I show you, sir, what has been marked as Government
25 Exhibit 3 for identification and I will ask you

Selected portions of the direct examination
of Detective Petronella, at trial.

1 to look at that, that's a plastic envelope, and
2 I would like you to tell the jury if you know
3 what the contents are of that, sir?

4 A. This is the money that I received from Mr. Jones
5 on the 25th of February, 1977.

6 Q. And, Mr. Petronella, how do you know that, sir?

7 A. Because it has -- This is my writing on this
8 yellow card plus the case number with Mr. Jones
9 and 7722 A.

10 MR. WAGNER: Your Honor, I could go on, but really
11 I would like to stick with the first
12 transaction which was on the 25th and
13 I would like to play the tape for the
14 Jury. I would like to make that offer.
15 Do you want to do that now?

16 THE COURT: Well, are you going to offer the
17 transcript, are you going to offer Government
18 Exhibit 3?

19 MR. WAGNER: Yes, I'll offer those at this time.

20 THE COURT: All right.

21 Your position as to them, Mr. Costa?

22 MR. COSTA: Yes, your Honor. I would like to ask
23 preliminary questions.

24 THE COURT: Certainly. Go ahead.

25 PRELIMINARY EXAMINATION BY MR. COSTA:

1 is that what you're asking me?

2 Q. Yes, or just about?

3 A. It is exactly what took place.

4 Q. Even where the words are unintelligible you know

5 what the word is supposed to be?

6 A. The unintelligible part would be my voice

7 speaking over his voice where a word would be

8 muffled out.

9 MR. COSTA: Thank you.

10 THE COURT: Any objection to those two exhibits?

11 MR. COSTA: Well, your Honor, so far as the

12 transcripts are concerned, at this point,

13 I would object because I don't believe

14 a necessary reason has been shown for

15 their admission at this juncture or the

16 propriety of admitting at this juncture.

17 Certainly he's able to tell us what he

18 testifies to, he's able to tell us what

19 the conversations are so the transcript

20 is not necessary in that sense. Certainly

21 it's secondary evidence, it wouldn't be

22 admissible at that juncture. If it's

23 being proffered in relation to the tapes

24 and to assist the jury in understanding

25 the tapes I don't think a foundation has

Selected portions of the direct examination
of Detective Petronella, at trial.

been made at that point showing the
necessity.

THE COURT: Well, the only thing missing in my
mind is the transcript, which I have seen
at one point, attributes certain speakings
to different individuals, does it not?

THE WITNESS: Yes, it does.

THE COURT: And the tape which I have also heard
has different persons voices on. Now,
were you at all able to know the voices
on the tape?

THE WITNESS: Yes.

THE COURT: And you can identify those from
listening to the tape?

THE WITNESS: Yes.

THE COURT: And what relationship then does that
identification of voices bear to the
indication on the transcript of who is
speaking?

THE WITNESS: Well, I would know that - which state-
ments I made and which statements Mr. Jones
made.

THE COURT: Well, the transcript attributes certain
things to you and certain things to Mr. Jones.

THE WITNESS: Yes.

1 THE COURT: And is that correctly attributed or not?
2 THE WITNESS: Yes, it is.
3 THE COURT: How do you know that?
4 THE WITNESS: Because I have heard the tape and
5 read the transcript along with the tape.
6 THE COURT: What about Government Exhibit 3,
7 Mr. Costa?
8 MR. WAGNER: Your Honor, I also move Government's
9 Exhibits 1 and 2 at this time into evidence.
10
11 PRELIMINARY EXAMINATION BY MR. COSTA:
12 Q. Deputy Petronella, on that first exhibit, I think
13 it is my recollection that you testified that
14 that photograph shows you and Mr. Riley?
15 A. No. I said myself.
16 THE COURT: I am still trying to find out about
17 Government Exhibit 3. Do you have objection
18 to Government Exhibit 3?
19 MR. COSTA: I have an objection to that portion
20 of that exhibit which deals to notations
21 made by Deputy Petronella.
22 MR. WAGNER: Your Honor, I don't oppose removing
23 this. Of course, it was essential to
24 keep it with the exhibits so the agent
25 could identify it.

Selected portions of the direct examination
of Detective Petronella, at trial.

(A copy of Government Exhibit 5 handed
to each juror.)

1
2
3
4 THE COURT: Don't pay much attention to the document
5 you have in your hand at this point Ladies
6 and Gentlemen, don't even read it at this
7 juncture. I am going to tell you what to do
8 with it. This as has been testified is
9 said to be a true copy of what is reflected
10 on the tape you are going to hear. It is
11 the identification of voices is said to be
12 true, and what it indicates is one individual
13 and Mr. Petronella has indicated that that
14 is the individual whose voice you are going
15 to hear at that point and the same as with
16 the other individual. Now you are going
17 to hear the tape and I want you to concentrate
18 on what is on the tape itself. Don't try
19 to read along from the transcript. Just
20 sort of refer back and forth to the transcript
21 as you need to, but basically if you are
22 watching and reading the transcript, you
23 are not going to be concentrating on what
24 you are listening to on the tape, you have
25 to concentrate on what is on that tape so

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WESTERN DISTRICT OF NEW YORK

Selected portions of the direct examination
of Detective Petronella, at trial.

1 just use the transcript as sort of a guide
2 and a point to point information, a program
3 of events, so-called, and concentrate on
4 what you are hearing on the tape.

5 MR. GINSBERG: We are ready, your Honor.

6 THE COURT: Wait until everybody gets set up.

7 MR. COSTA: Aren't we going to have Mr. Ginsberg
8 testify that he has done something to the
9 tapes?

10 THE COURT: He has not done anything to the tapes,
11 I don't think. Would you like to ask him
12 some questions?

13 MR. COSTA: Well, I think I would like to ask him
14 some questions for the jury's edification.

15 THE COURT: Well, there has been no showing of
16 anything done with the tapes.

17 MR. COSTA: Well, I understand that, your Honor,
18 but I think I want to have the jury understand
19 what Mr. Ginsberg has done, in a sense,
20 for their receiving the information that
21 they are going to hear over the tapes.

22 MR. WAGNER: I have no objection to that, your
23 Honor, if you would like to put him on the
24 stand.

25 THE COURT: No. Mr. Ginsberg will be available if



Selected portions of the direct examination
of Detective Petronella, at trial.

- 1 and entered the undercover vehicle.
- 2 Q. And that particular day, was that the extent of
- 3 your involvement with Mr. Ray Jones?
- 4 A. Yes.
- 5 Q. Except for turning the money over and the tapes
- 6 as you testified to earlier, is that right, sir?
- 7 A. Correct.
- 8 Q. Did you have any further conversations with Mr.
- 9 Jones after that time, sir?
- 10 A. Yes, I did.
- 11 Q. When was the next time that you had a conversation
- 12 with Mr. Jones and describe to the Jury what
- 13 that was, please?
- 14 A. I talked to Mr. Jones early afternoon of the
- 15 28th of February, 1977.
- 16 Q. Did you talk to Mr. Jones personally or not?
- 17 A. Yes.
- 18 Q. Did you talk with him visually, personally?
- 19 A. No. Over the telephone.
- 20 Q. Did you call him or did he call you?
- 21 A. I called Mr. Jones.
- 22 Q. Did you get a voice on the other end of the phone?
- 23 A. Yes.
- 24 Q. Did you recognize the voice?
- 25 A. Yes.

- 1 Q. And whose voice was it, sir?
- 2 A. That of Mr. Jones.
- 3 Q. I would you to tell the jury as best you can
- 4 recall, sir, what you said to Mr. Jones at that
- 5 time and what he said to you?
- 6 A. I told Mr. Jones, I said I was the person that
- 7 he seen a couple days ago pertaining to those
- 8 things, he stated, yes, if I had any more, I
- 9 said, I had a thou meaning a thousand dollars
- 10 worth, he stated that he couldn't handle that
- 11 many, but that he would take two hundred dollars
- 12 worth. I asked him how much he was going to
- 13 give me, he said sixty five dollars, I told him
- 14 that I would see him some time that afternoon
- 15 after four P.M.
- 16 Q. And did you have any further conversations with
- 17 him that you can recall at that particular time?
- 18 A. No.
- 19 Q. You terminated your conversation with Mr. Jones?
- 20 A. Yes.
- 21 Q. Did there ever come a time, sir, that same day
- 22 that you actually went out and saw Mr. Jones?
- 23 A. Yes.
- 24 Q. Approximately what time was that, sir?
- 25 A. Approximately four-ten, four-twelve P.M. on that day.

Selected portions of the direct examination
of Detective Petronella, at trial.

1 J O S E P H P E T R O N E L L A, (134 West Eagle
2 Street, Buffalo, New York) a witness called on and in
3 behalf of the Government, having been previously duly
4 sworn, resumed the stand and testified further as
5 follows:
6

7 DIRECT EXAMINATION BY MR. WAGNER: (CONTINUED)

8 Q. Mr. Petronella, sir, following your contact,
9 personal visual contact with Mr. Jones on February
10 28, 1977, did you have any additional conversations
11 with him at all, sir?

12 A. Yes.

13 Q. I would like you to tell the jury when the first
14 one was?

15 A. On the 8th of March, 1977.

16 Q. Do you recall approximately what time of day that
17 was, sir?

18 A. Early afternoon.

19 Q. How was it that you contacted Mr. Jones?

20 A. I phoned him, I called him on the phone, on the
21 telephone.

22 Q. And do you recall where you made that call from
23 sir?

24 A. 134 West Eagle in the Narcotics Office.

25 Q. That is your office?

Selected portions of the direct examination
of Detective Petronella, at trial.

- 1 A. Yes.
- 2 Q. Did you get a voice on the other end?
- 3 A. Yes, I did.
- 4 Q. Do you know whose voice it was?
- 5 A. That of Mr. Jones.
- 6 Q. You recognized it?
- 7 A. Yes,, sir.
- 8 Q. I would like you to tell the jury as best you
- 9 can recall what you said to Mr. Jones at that
- 10 time and what he said to you?
- 11 A. I told Mr. Jones that I was the person that he
- 12 did the thing with earlier, he stated that he
- 13 knew who I was, I told him that I would have
- 14 more of those things pertaining to stamps and
- 15 he stated that he wanted more but that he wanted
- 16 me to call him the following day and that he
- 17 would tell me how many he wanted.
- 18 Q. Do you recall having any further conversation
- 19 with him at that time, sir?
- 20 A. Yes.
- 21 Q. And what was that about?
- 22 A. On the 9th of March --
- 23 Q. I'm sorry. Back on the 8th, anything else at that
- 24 time?
- 25 A. No, sir.

Petronella-Direct
Selected portions of the direct examination
of Detective Petronella, at trial.

225

- 1 Q. About how long did the conversation take place?
- 2 A. A few minutes.
- 3 Q. Did you call him at the collision shop, do you
- 4 know, sir?
- 5 A. Yes, I did.
- 6 Q. Now did you see him again or have any conversations
- 7 with him a second time?
- 8 A. The 9th of March.
- 9 Q. Approximately what time of day was that, sir?
- 10 A. Early afternoon.
- 11 Q. Again, from where did you make the call, sir?
- 12 A. 134 West Eagle, the Narcotics office.
- 13 Q. Did you call the same number?
- 14 A. Yes,, I did.
- 15 Q. And who did you get?
- 16 A. Mr. Jones.
- 17 Q. Did you recognize his voice?
- 18 A. Yes.
- 19 Q. I would like you to again, sir, tell the jury
- 20 as best you can recall what you said to Mr. Jones
- 21 at that time and what he said to you?
- 22 A. At that time Mr. Jones stated to me that he
- 23 wanted four thousand dollars worth of food
- 24 stamps, in return he would give me a thousand
- 25 dollars in cash and that he wanted me to stop

Selected portions of the direct examination
of Detective Petronella, at trial.

1 by Friday between three and four P.M.

2 Q. Now Friday would have been following that --

3 A. Yes, the 11th of March.

4 Q. Did you have any further conversations with him
5 at that time, sir?

6 A. No, I did not.

7 Q. So the record is clear did you ever stop back
8 on the 11th of March on Friday?

9 A. I did not myself, no.

10 Q. That deal was never consummated, is that right?

11 A. No, it was not.

12 Q. Was that pretty much the extent of your investi-
13 gation with respect to Mr. Jones?

14 A. Yes.

15 MR. WAGNER: I have nothing else, your Honor.

16 THE COURT: Now, ladies and gentlemen, the evidence
17 that you have just heard relative to these
18 conversations on March 8th and March 9th
19 are admitted in evidence through Mr.
20 Petronella and over the objection of Mr.
21 Costa representing the defendant, and
22 it is that point that we have been dealing
23 with. As you will find out in greater detail
24 when I instruct you on the law that is going
25 to control your deliberations and decisions

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Selected portions of the direct examination
of Detective Petronella, at trial.

1 you will find that it is necessary for
2 the Government to prove that in connection
3 with this basic alleged criminal activity
4 that there was a certain intent and knowledge
5 on the part of Mr. Jones that must be proved.
6 And also you have understood from the
7 questioning when you were selected that
8 there well might be a defense of what we
9 call entrapment, namely that Mr. Jones
10 is claiming or will claim that he had
11 no disposition or intent or other inclination
12 to get into this type of activity except
13 that the Federal agent or the Sheriff's -
14 the people from the Sheriff's Department
15 acting with the Federal agent came to him
16 and really led him into this path of
17 criminality and consequently entrapped him.
18 And as I again will tell you later, the
19 defense of entrapment can be met and must
20 be met by Mr. Wagner of showing either
21 that there was no such entrapment or urging
22 or leading Mr. Jones into it or that Mr.
23 Jones had a predisposition, a willingness
24 prior to that time to engage in that type
25 of activity. And if the Government shows

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WESTERN DISTRICT OF NEW YORK

Selected portions of the direct examination
of Detective Petronella, at trial.

1 either of those circumstances beyond a
2 reasonable doubt, and of course, I will
3 tell you more about that level of proof
4 later, then the defense of entrapment is
5 not present and available for Mr. Jones.
6 I have admitted this evidence concerning
7 these conversations as bearing upon the
8 issues of Mr. Jones' intent on February
9 25 and February 28 on the issue of Mr. Jones'
10 knowledge on February 25 and February 28,
11 on his motivation on February 25 and February
12 28, it has not been admitted to show pre-
13 disposition or pre-event willingness to
14 go along into this activity so consequently
15 it has come in for one purpose, intent
16 and knowledge and motive. It is not in the
17 case as bearing upon the defense of entrap-
18 ment. I mention that at this time and
19 I will give you more details of course,
20 later before you go to your deliberation.

21
22 CROSS-EXAMINATION BY MR. COSTA:

23 Q. Good morning.

24 A. Good morning.

25 Q. Initially when you took the stand, sir, I thought

Selected portions of the direct examination
of Detective Petronella, at trial.

plan willingly. That the thrust of all of
the cases, the fact that we willingly
participate is not sufficient criteria
to establish predisposition. Any further
paraphrasing I think would be redundant.

THE COURT: Mr. Wagner.

MR. WAGNER: Your Honor, I'm not sure precisely
what Mr. Costa's grounds are. He mentioned
something about informant. It does not
appear to me that failure to call an informant
by the Government would justify the granting
of a motion for acquittal or dismissal
following the Government's case. Perhaps
the failure to produce an informant for the
defendant to call might, and I say might.
But I would like the record to reflect
that Mr. Riley has been subpoenaed by us .
he is available for Mr. Costa, Mr. Costa
knows that. He is one floor down whenever
he would like to call him. He has had an
opportunity to talk to him. Whether Mr. Riley
has been cooperative or not is another
matter, but he is available to be called.

With respect to his argument that the
indictment should be dismissed or perhaps

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WESTERN DISTRICT OF NEW YORK

82-A

Judge Elfvin's ruling on defendant's Motion for Acquittal.

Judge Elfvin's ruling on defendant's Motion for Acquittal.

1 PROCEEDINGS:

July 20, 1977

9:00 A.M.

3 APPEARANCES:

As Before Noted

(Defendant Present)

(Jury Not Present)

9 THE COURT:

Now, I have been doing some work
relative to the motion made by you, Mr.
Costa, on behalf of Mr. Jones, to dismiss
the case at the end of the Government's
case, and I have come to the decision
that it should be denied. A lot of my
reason - well, my basic reason on it
is I do fasten upon the Government the
burden of having proven that there was no
entrapment, but I find that there is in the
Government's case a sufficient amount of
evidence which if the Jury believes it,
would carry the day in that regard. The
significant difference in this case as
opposed to many of the cases which have
dealt with that question is the circumstance
that we do have the two tapes and we do have

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WESTERN DISTRICT OF NEW YORK

82-B

Judge Elfvin's ruling on defendant's Motion for Acquittal.

1 the voices thereon of the two participants,
2 and if the jury believes that those
3 participants on the tapes are Mr. Petronella
4 and Mr. Jones and that there had not been
5 any alteration of the tape or any - either
6 by way of additions or deletions, the
7 jury then is presented with the whole
8 package of conversation including the
9 pace of the conversation, the total qualities
10 and the attitudes of the participants that
11 come through in the tape, and if the jury
12 were to believe everything the Government's
13 way, which of course they are entitled to
14 do if they see fit, there would be sufficient
15 evidence therein leaving aside any question
16 about Mr. Riley or anything that Mr. Riley
17 had put into the situation in my mind to
18 justify the jury in deciding that at that
19 point on February 25, 1977, Mr. Jones was
20 a ready, willing and predisposed participant.
21 Now, of course, it is not my decision to
22 make, I am not the fact finder. My only
23 decision is to say that if the jury so
24 decided there would be a sufficient quantum
25 of evidence there to support that decision.

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WESTERN DISTRICT OF NEW YORK

82-C

Judge Elfvin's ruling on defendant's Motion for Acquittal.

1 They might very well go the other way
2 on it, of course. My decision then on
3 that basis is to deny the motion for
4 dismissal at the end of the Government's
5 case.

6 Bring up the jury.

7 MR. COSTA: Your Honor, --

8 THE COURT: Incidentally what now has happened?
9 You were going to want to make a decision
10 relative to Mr. Riley. I can't remember
11 what else you had.

12 MR. COSTA: Well, your Honor, first I want to
13 address myself to your Honor's decision.
14 I take respectful exception.

15 THE COURT: Yes, of course, you have your
16 exception.

17 MR. COSTA: I don't think it's necessary for me
18 to repeat all the argument that I have
19 made on this question.

20 THE COURT: No. I assure you I gave everything
21 full consideration, Mr. Costa.

22 MR. COSTA: When the jury comes down, your Honor,
23 I'm going to make an offer of proof, not
24 an offer of proof, but I'm going to offer
25 in evidence the photocopy of the application

Proceedings before the Court on 7-20-77, outside the presence of the jury; regarding the availability of the Government informer.

1 Proceedings before the Court on 7-20-77, outside the
2 presence of the jury; regarding the availability
3 of the Government informer.
4 evidence, as I mentioned yesterday, that
5 the defendant was predisposed to commit the
6 offense which would, of course, negate
7 the entrapment defense. To Mr. Costa's
8 argument that the Government - apparently
9 his argument is that this case should be
10 dismissed or the defendant should be found
11 not guilty by you because the Government
12 did not call the informant, and I do not
13 find that position of sufficient merit
14 or of sufficient logic, frankly, to know
15 exactly how to rebut it. I will simply
16 say that the Government is not obligated
17 to call the informant, he is still here
18 for Mr. Costa to call, he has not been
19 denied the right to have him at the trial.
20 In fact, he has him at the trial. That issue
21 simply does not result in motions for
22 dismissal or acquittal.. I believe that
23 has nothing to do with entrapment.

24 I also agree with your Honor that Mr.
25 Manns' testimony was primarily rebuttal
for that specific purpose, it was not
designed to show predisposition.

MR. COSTA: Finished, Ed?

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Prosecutor's Summation, 7-20-77.

Prosecutor's Summation, 7-20-77.

1 that I have received in evidence, and
2 those documents with a couple of
3 exceptions that I will mention to
4 you later, will be available to you
5 in the jury room during your delibera-
6 tions. The testimony and the documents
7 constitute the evidence. The attorneys
8 are going to argue to you and they
9 are not going to give you any further
10 evidence. Mr. Wagner on behalf of the
11 Government will speak first and then
12 Mr. Costa, and there may or may not be
13 some brief rebuttal by Mr. Wagner
14 depending on how I rule on that and
15 whether there is any request for it.

16 SUMMATION:

So, Mr. Wagner.

17 MR. WAGNER:

Thank you.

18 Ladies and gentlemen, as Judge
19 Elfvin said, this is my chance to
20 argue to you, and I want to make
21 clear to you for the record what I
22 am arguing here is what I submit
23 to you the facts that the evidence
24 have shown the last couple of days.
25 Now, first of all, as the case with

Prosecutor's Summation, 7-20-77.

1 every jury you people were not there
2 so you know nothing about the case
3 when you come into Court the first
4 day. In fact, if you knew anything
5 about the case you would be asked not
6 to be a juror. So your role is to
7 sit and listen to the evidence and
8 to learn it all while you sit here
9 from the voices of the witnesses and
10 from the exhibits you have and when
11 you get done hearing all the witnesses
12 and seeing all the exhibits you make
13 certain conclusions, and Mr. Costa
14 will argue that you should make one
15 conclusion and I'm about to argue that
16 you should make another one. I
17 think that you can make immediately
18 without any real difficulty one very
19 important conclusion in this case that's
20 critical, I submit to you, in deciding
21 what you're going to do in the long
22 run, and that immediate decision that
23 you're going to make and that immediate
24 conclusion is that the people that were
25 in here cannot all be telling the truth,

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WESTERN DISTRICT OF NEW YORK

87

Prosecutor's Summation, 7-20-77.

1 they simply cannot all be telling the
2 truth. Some of them are wrong. They
3 are either mistaken or they are lying
4 but that's pretty obvious to all of
5 us, I submit to you, because the stories
6 were too different on too many important
7 points. I'm referring obviously to
8 the story Mr. Jones gave about what
9 happened and I'm comparing that with
10 the story given by the agents and the
11 version which you heard on the tapes.

12 Now, it's my position as the
13 prosecutor to urge for you to accept
14 the position taken by the agents and
15 the version that was made on the tapes
16 and I'm asking you to do that. I'm
17 also asking you that in order to do
18 that properly you must simply reject
19 the version in many respects that Mr.
20 Jones gave. You must come to the
21 conclusion that he was not telling
22 the complete truth. Now, some of the
23 things he said were true admittedly
24 but I submit to you that some of the
25 things he was telling us simply were

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WESTERN DISTRICT OF NEW YORK

88

Prosecutor's Summation, 7-20-77.

1 not true, and I will explain to you
2 why I want you to find that in just
3 a minute.

4 Now, first of all, the Judge will
5 explain to you that the Government
6 has to prove a few technical elements,
7 a few elements regarding intent,
8 et cetera. Our case is that Mr. Jones
9 improperly acquired food stamps, and
10 of course, to prove that to you we
11 must prove that there were food stamps
12 involved, and I submit to you there
13 is not much dispute that there were
14 food stamps, Mr. Shortall said he
15 brought them up from New York, he
16 took them out of the vault, he's
17 experience with dealing with food
18 stamps and he says they were food
19 stamps and no one disputes that. In
20 fact, Mr. Jones says he took them and
21 cashed them at the grocery store. So
22 I don't want to spend any time on that.
23 We also have to prove to you that
24 there is a right way of getting food
25 stamps, and I believe that Mr. Wirges

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 testified that there is a right way
2 of getting them, you go to the office
3 and apply and you get them. I think
4 it's pretty obvious to all of us that
5 the way Mr. Jones got these food
6 stamps was not the right way. Again,
7 I don't want to spend any time on
8 that. It's also, I think, quite
9 obvious from all of the testimony
10 that Mr. Jones got food stamps, he
11 admits it, he got them from someone,
12 and he admits further that he knew
13 that it was wrong, he knew that that
14 was an improper way of doing it. So
15 what Mr. Jones is asking you and what
16 I'm asking you to reject is his posi-
17 tion that he was entrapped into this
18 transaction. Now, the word entrapment
19 is a legal term and the Judge will
20 explain to you exactly what it means.
21 But I will submit to you at this time
22 that Mr. Jones' argument that he was
23 entrapped into the case is simply not
24 what you should find and I'm asking
25 you not to find that and I'll explain

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 to you why not. Now, the Judge will
2 discuss for you in detail what an
3 entrapment defense means, what the
4 Government must show and what the
5 elements and the aspects of entrapment
6 are. What a critical point on entrap-
7 ment claimed by the Defendant is that
8 he was completely innocent, he was an
9 unwary person, minding his own business,
10 and he was forced into conduct that he
11 was not ready --

12 MR. COSTA: Well, your Honor, --

13 MR. WAGNER: -- and willing to buy food stamps.

14 MR. COSTA: Just a minute. I have got to
15 object to Mr. Wagner's contention
16 about force. It's not my understanding
17 or your Honor's understanding about
18 the concept of entrapment about force.

19 THE COURT: Mr. Wagner is not telling what
20 the law is. He is using this term
21 which has various meanings and there
22 will be no problem.

23 Go ahead, Mr. Wagner.

24 MR. WAGNER: Mr. Jones is telling you that he
25 was forced into this and it is our

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 position and I'm asking you to find
2 that that simply is not the case.
3 Now, I'm asking you to do that for
4 this reason, the defense of entrapment
5 as the Judge will explain to you in
6 its own proper language says that if
7 a person - if contact was begun by a
8 police agency, if they initiate the
9 conduct, when a man is ready and
10 willing and able to commit the
11 offense anyway, if he's ripe to
12 commit a crime then he's not entrapped,
13 that's the law. He has to be forced
14 or coerced, his will has to be over-
15 come by the police, he has to be
16 essentially an innocent person that
17 has no predisposition to commit the
18 offense. The Judge will tell you
19 that it doesn't matter if the police
20 start the conduct as long as this
21 man was predisposed to commit the
22 crime, and I intend to tell you now
23 why the evidence shows you that Mr.
24 Jones was predisposed to commit this
25 crime anyway. Now, first of all, I

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 want to point out to you that I am
2 not telling you that the police did
3 not first contact Mr. Jones, it's
4 obvious what happened, they went in
5 to see him, As a matter of fact, the
6 testimony was by Mr. Petronella that
7 he sent the informant James Riley in
8 first to make an introduction. I
9 submit to you that that is a legitimate
10 police practice. It would be too much
11 to expect for Mr. Jones to walk into
12 the Sheriff's office some afternoon
13 and say to the Sheriff, "I'm Mr.
14 Jones, I would like to commit some
15 crime.", it's not going to happen,
16 it's never going to happen. The
17 police simply have to go out and
18 investigate crimes, they have to go
19 out and do that, and that's a proper
20 role for the police to take. So the
21 mere fact that they approached Mr.
22 Jones with these stamps does not mean
23 that he was entrapped into it. What
24 you have to ask yourself is what was
25 Mr. Jones like at that time, what was

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 his disposition when they came in to
2 see him, when they approached him,
3 was he ready to do it or was he unwilling,
4 did he go along with the deal, was he
5 able and predisposed to do it or did
6 he say no, I don't want you in my shop,
7 get out, I don't do that kind of stuff,
8 I'm an honest man, I don't want any-
9 thing to do with it, did he throw the
10 agent out, that's what you ask yourself,
11 and that's the issue in the case.

12 Now, first of all, when I tell
13 you that Mr. Jones was predisposed to
14 commit the offense, think about what
15 he did, think about how he acted, and
16 I ask you, of course, to do that from
17 the testimony of the witnesses. You
18 heard Mr. Petronella testify what
19 happened very briefly. I submit to
20 you that better than that we have a
21 tape of a conversation that went on,
22 and I'll suggest to you that that is
23 unquestionably the best evidence for
24 you to consider in this case because
25 that's there for you to hear. There's

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WESTERN DISTRICT OF NEW YORK

94

Prosecutor's Summation, 7-20-77.

1 no dispute about it. If you believe
2 the tape there's no dispute about
3 it. The agent or the witness may say
4 I can't recall, or they used the
5 phrase my best recollection, or they
6 summarized what happened. The tape
7 doesn't do that. It tells you what
8 was said. If you believe the tape
9 you know what was said. I suggest
10 to you, by the way, that you should
11 believe the tape. The tape is in
12 evidence. So you ask yourselves in
13 deciding knowing that the agent went
14 in there, you ask yourselves what was
15 Mr. Jones like at the time, how did
16 he act, how did he behave, what was
17 his attitude, what was his disposition
18 at that time, was he ready and willing
19 to commit these crimes or was he not?
20 All right. I suggest you listen to
21 the tapes to do that, and you heard
22 the tapes, you heard it a couple of
23 times, and you can hear it again if
24 you want to while you're deliberating.
25 I have a transcript here, and I will

Prosecutor's Summation, 7-20-77.

1 ask you again to use your recollection,
2 this is to assist me in making my
3 argument, you use your recollection.
4 The agent comes into the Jones Collision
5 Shop and says, "What's happening?",
6 and Jones says, "Nothin much.", there's
7 an unintelligible part there, Petronella
8 says, "I know, I mean I don't dig
9 comin in with'em. That's why.", Jones
10 invites him, "Have a seat.", he says,
11 "Whadda ya got here?", Petronella,
12 "I got ah stamps.", Jones, "Uh how many?",
13 he asked him how many do you have,
14 not the kind of comment a person would
15 make if they didn't want anything to
16 do with this. But let's go on.
17 Petronella tells him, "A thou.", and
18 he implies a thousand and I submit
19 to you that's the reasonable inference.
20 Jones tells him, "I can't handle a
21 thousand.", he doesn't say to him
22 get out of my store, I don't want food
23 stamps, he tells him, "I can't handle
24 a thousand.". The kind of comment a
25 person would say if they knew what

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 they were talking about who were
2 willing to deal in stamps. The
3 question I submit to you is how many
4 he's going to handle here, not whether
5 he's going to do it or not. Petronella,
6 "What could you handle? I'm looking
7 for a third.". Now, I admit to you
8 that that's street language. They
9 didn't go in there and talk like
10 scholars in a classroom, something
11 what you might find in a grammar book.
12 It's undercover work, it's a collision
13 shop on Fillmore Avenue, they talk
14 like normal people do. "I'm looking
15 for a third." Petronella says, Jones,
16 "Well, he's talkin' fifty cents --",
17 Petronella, "Well.", Jones, "Cents on
18 the dollar.". Mr. Jones is talking
19 price for food stamps, fifty cents on
20 the dollar, a discounted price, and I
21 submit to you that that is very, very
22 solid evidence that Mr. Jones knows
23 what's going on here and is looking
24 for a good price. I submit to you
25 that the man is looking for a good price

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WESTERN DISTRICT OF NEW YORK

97

Prosecutor's Summation, 7-20-77.

1 only if he is disposed to do it.
2 Petronella tells him that, "A third
3 is a little better for you.", Jones
4 says, "Huh?", and Petronella says,
5 "A third is cheaper.". He points out
6 that his price is better than some
7 other price. Mr. Jones may know of
8 or may be using it as a bargaining
9 tool here. Jones says, "Well what are
10 we gonna do?". Jones doesn't throw
11 him out, doesn't say what is this,
12 I don't want to buy stolen food
13 stamps or improper food stamps, I
14 don't want anything to do with that,
15 get out of my shop, he didn't say
16 that, he said, "-- what are we gonna
17 do?", he's talking about a price,
18 setting up a deal. Petronella says,
19 "Three and a quarter for a thou."
20 Did Mr. Jones reject that offer?
21 Absolutely not. He responds, "Three
22 and a quarter for a thou? I can't --
23 damn, I can't get rid, I can't get rid
24 of that many.". Well, get rid of them
25 during what, taking them to the store,

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WESTERN DISTRICT OF NEW YORK

98

Prosecutor's Summation, 7-20-77.

1 selling them, who know? But I
2 submit to you that he was ready to
3 buy them, it was a question of price
4 and how many he can handle, not
5 whether he'll do it or not. Jones
6 says - Petronella says, "No?", and
7 Jones says, "Unless I talk to him.",
8 a comment that Mr. Jones admits
9 making. It's cryptic, we don't know
10 what he's referring to. Petronella
11 says, "Three hundred?", the price
12 is coming down a little bit; Jones,
13 "I can handle -- ah -- I can handle
14 half of 'em for ya.". Again an
15 unlikely comment by a man who doesn't
16 want to engage in this kind of activity.
17 Petronella says, "Gimme three hundred.";
18 Jones, "I can't, I ain't got three
19 hundred first of all.". He doesn't
20 have the cash on him, that's why he's
21 not dealing with him. Petronella,
22 "Alright."; Jones says, "And I can't
23 get rid of 'em. I did all the checking
24 I could get.". Well, we know he didn't
25 check while Petronella was there because

Prosecutor's Summation, 7-20-77.

1 you don't hear him checking. Why is
2 the man checking whether he can get
3 rid of food stamps or not if he isn't
4 interested in getting a good deal.
5 He is engaging in conduct which he
6 himself admitted is wrong. So
7 Petronella and he engage in a bargain
8 here. Petronella, "Alright, five hundred
9 for a hundred and a half.". He told
10 you he meant five hundred dollars in
11 food stamps for a hundred and fifty
12 dollars. Jones, "Five hundred for a
13 hundred and a half? Deal.". He was
14 talked into it awfully fast, wasn't
15 he, for a man who didn't want to do
16 it, had no desire to engage in the
17 conduct. He strikes a bargain with
18 the agent, and you can time it if you
19 want by your watch, within the first
20 couple of minutes he's in that store,
21 in that shop. Petronella - Jones
22 says to him, "Fifty dollar books?";
23 Petronella says, "Forty."; Jones says,
24 "Forty-dollar books."? and he counts
25 out the money, "That's four hundred,

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WESTERN DISTRICT OF NEW YORK

100

Prosecutor's Summation, 7-20-77.

1 four eighty, --", and you heard him
2 testify he counts out the books.
3 Jones then says, "A hundred and fifty
4 bucks."; he hands the money over to
5 Petronella and he says, "Good deal."
6 Good deal by guy. Of course it's a
7 good deal, he got three hundred - five
8 hundred dollars in food stamps for a
9 hundred and fifty dollars. He can do
10 what he wants to with them, he can
11 sell them, he can take them to a store.
12 Mr. Wirges said he could cash a dollar's
13 worth of food stamps in for a dollar's
14 worth of food. So he can get five
15 hundred dollars worth of food and it
16 costs him a hundred and fifty dollars
17 and he wants you to believe that he
18 had no desire to do that at all. Mr.
19 Petronella says, "I don't dig you
20 being here with a gun and me with
21 nothin.", he then went on to say,
22 "-- well, I'll have'em for the weekend
23 if you want me to stop back --", I'll
24 have more for you; Jones, does he
25 rebuff him and say lookit, I don't

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WESTERN DISTRICT OF NEW YORK

/01

Prosecutor's Summation, 7-20-77.

1 want to do this, get out of my shop,
2 I didn't want you around here;
3 absolutely not;"Check with me, all
4 right?"Jones - Petronella, "When?";
5 Jones, "I'll be here tomorrow.", come
6 back again tomorrow we'll do it again,
7 we'll do it again he's telling him.
8 I submit to you that that's a man
9 who wants to deal in food stamps
10 illegally, not a fella that doesn't
11 want anything to do with it. Petronella,
12 "Alright, what time?"; Jones, "Around
13 noon."; Petronella, he says, "Ok.
14 How about later than that, or no?";
15 Jones, "No, I close around three, Ok.";
16 he's setting up a time for him to come
17 back and buy more food stamps; Petronella,
18 "Alright if I come anytime between -
19 ah - twelve and three?"; Jones says,
20 "Ten and three.". It gives him a lot
21 of time to come back, he wants those
22 stamps. Petronella, "Ten and three
23 tomorrow? Ok. That's a hundred and
24 fifty. Ok Ray.", and Ray responds,
25 "Ok, thank you.", and that's it;

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WESTERN DISTRICT OF NEW YORK

102

Prosecutor's Summation, 7-20-77.

Petronella says thank you and they walk out.

Now, according to Mr. Petronella that was the entire conversation. He says that that's what occurred, he recalls it, he doesn't recall the exact words but he recalls that being accurate, he heard the tape, and I submit to you that that is what happened, exactly what happened. Mr. Jones disagrees with us on that point. In any event, according to Petronella, he calls him again the following Monday the 28th and he tells him according to Petronella, "I've got some more stamps.". In fact, Mr. Petronella testified that he tells him he's got a thousand dollars in stamps and he's coming by. According to Mr. Petronella Jones said I don't want a thousand, I only want two hundred dollars worth of stamps. So Petronella goes by with two hundred dollars worth of stamps according to his testimony. You heard Mr. Shortall says he provided

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WESTERN DISTRICT OF NEW YORK

103

Prosecutor's Summation, 7-20-77.

1 those stamps to Mr. Petronella. Again
2 Mr. Petronella tells you what happened.
3 He gives his version, and his version
4 is we had a conversation, I don't
5 recall the exact details but that's
6 what happened, I sold him food stamps.
7 Okay? We do have the tape. Again
8 I tell you rely on that tape, listen
9 to it, because it's very important
10 to this case.

11 What happened on this second
12 occasion? Petronella comes in,
13 "How ya doin. I got'em in the trunk.
14 I don't wanna come in for'em."; Jones
15 says, "Can't do that out here.";
16 Petronella says, "Oh, I don't care,
17 it's just me --"; Jones says, "Damn.";
18 Petronella says, "They're only four
19 here. Ray? I only brought the two
20 of'em. Well that's what you wanted.
21 What did you want?"; and of course
22 Petronella testified that he talked
23 about a thousand dollars in stamps
24 and Jones only wanted two hundred
25 dollars for them. Jones said, "Wanted

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WESTERN DISTRICT OF NEW YORK

104

Prosecutor's Summation, 7-20-77.

1 all of'em."; and I submit to you that
2 you should infer properly that Jones
3 now wishes he had a thousand dollars
4 in stamps. Petronella says, "Oh, ha!",
5 and Jones says, "I wan'ta sell the
6 whole grand for you.", that's what he
7 said to him. The man tells Petronella
8 I want to sell a thousand dollars in
9 food stamps for you and he wants you
10 to believe that he had nothing to do
11 with this thing and would not have
12 done it but for the fact that the
13 agent pressured him into it.

14 MR. COSTA:

Your Honor, I'm going to object
15 to the use of the word pressured again.
16 We're talking about the concept of
17 entrapment and I think any reference
18 to the terminology other than what
19 your Honor will charge on the law in
20 this matter should be refrained by
21 Mr. Wagner.

22 THE COURT:

These are phrases which Mr. Wagner
23 may use and the jury will not take
24 them literally. I will tell the jury
25 exactly what is embraced in the words.

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WESTERN DISTRICT OF NEW YORK

105

Prosecutor's Summation, 7-20-77.

1 MR. WAGNER:

2 Now, Petronella and Jones go on
3 with their conversation. Petronella
4 says, "Yea, but who knew?", implying,
5 I submit to you, that he had been told
6 earlier that Jones only wanted two
7 hundred dollars worth and now he tells
8 him he wants a thousand dollars worth
9 and Petronella says I didn't know that,
10 I would have brought a thousand for
11 you; Jones says, "Huh?"; Petronella
12 says, "How much you got?"; and Jones
13 says again, "I'd a sold the whole
14 grand for you."; he's talking about
15 a thousand dollars in stamps, he
16 actually is asking the agent for more
17 stamps than the agent has; and
18 Petronella responds to him, "I'll
19 have to - ah - come back. How long
20 will you be here?". By the way, in
21 this particular part of the conversa-
22 tion remember Mr. Jones' story that
23 he thought he was being robbed, he
24 was trying to avoid a bad situation.
25 Petronella says I'll have to come
back, how long will you be here; Jones

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WESTERN DISTRICT OF NEW YORK

106

Prosecutor's Summation, 7-20-77.

1 says, "Be here another fifteen twenty
2 minutes. Can you make it back by then?
3 Can ya? Alright what've we got here
4 sixty bucks?"; and Petronella says,
5 "Sixty-five dollars worth.". He told
6 you that that was sixty-five dollars
7 he was charging for the two hundred
8 dollars in stamps. Mr. Jones says,
9 "Sixty-five dollars worth. Alright
10 there's sixty and there's five."; he
11 counts out sixty-five dollars in cash.
12 Mr. Petronella says, "Alright how
13 much money ya got there? What is it
14 you want?"; and according to the tape,
15 and I submit to you the proper version
16 continues as follows, Mr. Jones says,
17 "Huh?", and Petronella says, "Tell
18 me how much - how much more do you
19 want?"; he asked him do you want
20 stamps how much more; and that's the
21 agent's job, he's an undercover agent,
22 he's out there to find out who's doing
23 illegal conduct, and Jones says, "Well,
24 what do you. Gimme another eight
25 hundred dollars worth. Eight hundred

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WESTERN DISTRICT OF NEW YORK

107

Prosecutor's Summation, 7-20-77.

1 dollars would be what?". Mr. Jones
2 asked the agent for another eight
3 hundred dollars in food stamps and
4 he's worried about the price and he's
5 asking you to find that he had nothing
6 to do with this, he didn't want to do
7 it, he had no inclination, no predisposi-
8 tion to do this crime at all, and yet
9 the tape, you can hear his voice on
10 there, is asking the agent for eight
11 hundred dollars more in stamps because
12 he got a good price on them. Petronella
13 tells him the price will be, "Two
14 sixty?", and Jones says, "Two fifty.
15 I gave ya sixty-five so that would be
16 a hundred and eighty-five dollars more.
17 Right? You owe me eight hundred dollars
18 more."; he's actually asking the agent
19 to come back with eight hundred
20 dollars in stamps and he wants to
21 give him a hundred and sixty-five
22 dollars. Petronella says, "Alright."
23 Of course, he says that that's his
24 job, that's his role in this investiga-
25 tion. Jones says, "Ok.", and Petronella

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WESTERN DISTRICT OF NEW YORK

108

Prosecutor's Summation, 7-20-77.

1 says, "Ok Ray.", and he leaves, and
2 that's it according to the tape.
3 I ask you again to listen to that
4 tape if you want to or rely on your
5 recollections or the recollections
6 of the jury as a group. Now, Mr.
7 Petronella testifies that he called
8 Mr. Jones back two more times and he
9 asked him do you want more stamps
10 and he says, according to Mr. Petronella,
11 yes I want more stamps, and they agree
12 on a thousand dollars in stamps. I
13 submit to you that that's important
14 to know what Mr. Jones' intent and
15 knowledge was on those two earlier
16 days. We don't care what his intent
17 and knowledge was on the 8th and 9th
18 of March but you can tell a lot by a
19 person's - their past by what they're
20 doing now, and I submit to you that
21 that's valuable to you, it's not
22 critical but it's valuable to you.
23 And, of course, Mr. Petronella testified
24 that that deal never went down, was
25 never consummated. Now, I asked you

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WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

when I first got up here to find that Mr. Petronella was telling the truth, and I submit to you that if you do that you will also find that the tape is a correct version of what went on. I submit to you that there are some scratchy spots in the tape but - there's a siren going by right now and that happened on the tape at one point, that's unavoidable, but I ask you to listen to the tape and judge for your-
self whether or not it's complete, essentially complete, and I suggest to you that you will find that it is, it flows neatly, the voices all match up, the background noise stays the same, the answer is the right answer for the question, it's not as if he says to a person what time is it and the answer is it's Monday because that doesn't make any sense, the answers are right, everything flows, everything is neat, and I ask you to keep that in mind because Mr. Jones testified in this case and told us

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WESTERN DISTRICT OF NEW YORK

110

Prosecutor's Summation, 7-20-77.

1 that that is not what happened although
2 he gave a slightly different story,
3 and I'm asking you, by the way, to
4 reject Mr. Jones' version. Now, a lot
5 of what Mr. Jones says is confirmed
6 by the tape. He says yes, that's my
7 voice and Mr. Petronella's voice, he
8 admits that. I submit to you that
9 he would be a fool to deny he was
10 there in his own collision shop when
11 you can hear his voice on the tape.
12 So what does Mr. Jones do, he tells
13 you well, yes, that's right. He
14 can't deny it. And when I read him
15 the transcript except for a couple
16 of things he said yes, that's what I
17 said, that is correct, I remember
18 saying that, he admits it. So how
19 does he get around the problem that
20 he has incriminated himself? He says
21 to you, well, there are other things
22 that aren't on the tape, there was a
23 lot of other conversation. And Mr.
24 Jones, I submit to you, gives us a
25 story that is not believable, and I

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

111

Prosecutor's Summation, 7-20-77.

1 ask you not to believe it. First of
2 all, consider his whole point. He
3 says that Mr. Petronella came by with
4 a fur coat on which is not all that
5 unusual in February in Buffalo, and
6 that he was with a fellow that he
7 claims he knows, Ronnie Manns, according
8 to Mr. Jones. Somehow, according to
9 Mr. Jones, he thought he was being
10 robbed. All right. He tells you
11 that he thought he was going to be
12 robbed and that's why he went along
13 with this. Now, I suggest to you
14 that that story is incredible, it's
15 just not true. I say to you it's not
16 true because nothing else makes any
17 sense if that's true. It doesn't fit
18 in with the other facts. Where on the
19 tape does he exhibit any hesitancy
20 to deal? Nowhere. He couldn't find
21 it. His only answer when I asked
22 him was, well, it's not on the tape,
23 it's missing, that part is missing.
24 But it's not on the tape. If you
25 listen to the tape he does not resist

Prosecutor's Summation, 7-20-77.

1 the agent. It's also not clear, I
2 submit to you, whether or not his story
3 is that he thought he was being robbed
4 at first and then realized he wasn't
5 or whether he thought somehow, and this
6 really has to stretch the imagination,
7 but he thought somehow that if he
8 didn't engage in this illegal conduct
9 Mr. Petronella would turn around and
10 rob him. I don't know what he's asking
11 you to believe. I suggest to you
12 that any of the versions are inherently
13 incredible and should not be accepted.
14 Does Mr. Jones call the police when
15 Mr. Petronella comes and he thinks he's
16 being robbed? Does he ask him politely
17 to please leave my store or I'm busy
18 with other customers, no; he deals
19 with him, he buys food stamps from
20 him. Not the kind of conduct of a
21 person who thought he was being robbed,
22 I submit to you, but he wants you to
23 think that. And most important of all,
24 it's simply not on the tape at all,
25 it's not there. So Mr. Jones tells us,

Prosecutor's Summation, 7-20-77.

1 well, yes, Mr. Wagner, what you read
2 was correct, I did say all that but
3 hidden in there is this thinking of
4 mine that I was being robbed and there
5 are some other things that are not on
6 there, I don't know why but they're
7 not on there. All right. Let's go
8 on with Mr. Jones' version of it and
9 test it against your logic and your
10 experience so you can decide whether
11 to believe it or not. He tells us,
12 he admits to us that Mr. Petronella
13 called him back on the 28th. Okay.
14 Now, he's already known, by the way,
15 that Mr. Petronella did not rob him,
16 he knows that, he wasn't robbed on
17 the 25th. In fact, he bought food
18 stamps at a discount price, a pretty
19 good price, as a matter of fact,
20 which he keeps and spends, uses for
21 food. But now he tells us, well, I
22 thought he was coming by to rob me
23 again. All right. He didn't rob him
24 the first time. And now he's calling
25 him up, a robber is calling him up and

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

114

Prosecutor's Summation, 7-20-77.

1 telling him he's coming by, he's
2 alerting his victim that he's coming
3 by, "I'm coming by to rob you.". Now,
4 do what you want to do but I'm asking
5 you on the evidence here to reject
6 that. Does he close his business
7 down if these robbers are coming by
8 and call the police, does he tell his
9 friends in the store, "We're going to
10 be robbed in a few minutes, robbers
11 are going to be by. Let's board the
12 place up, let's lock the safe.", no,
13 he does nothing, he doesn't tell any-
14 body, he doesn't call anybody the
15 whole weekend. He has a customer
16 with him which he escorts out, does
17 he say to the customer, "On your way
18 out call the police, I'm being robbed,
19 robbers are coming.", no, he lets
20 him go. I suggest to you that that
21 is the behavior of a man who's waiting
22 to buy food stamps, not a man who
23 thinks he's going to be robbed. He
24 admits that Mr. Petronella came in,
25 he tells us again I resisted, I didn't

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

115

Prosecutor's Summation, 7-20-77.

1 want to do it again, but again nowhere
2 on the tape is that resistance known,
3 it's not there. Mr. Jones says yes,
4 that's my voice, I said all that but
5 there must have been some other spots
6 in there, I don't know exactly where
7 but he's sure there were some other
8 spots. He told us something about
9 how he needed a license number from
10 Mr. Petronella's car. You can recall
11 a question being put to him, "Did you
12 go outside and see the car?", and his
13 answer was, "No, I didn't. I was
14 afraid, I was scared of him.". He
15 also tells us, by the way, that the
16 car was parked right in front of his
17 door so that he couldn't possibly see
18 the license number. Well, we have two
19 photographs of Mr. Petronella on the
20 28th, and you look on there and see
21 if the car is in front of the door.
22 It is not, it is not in front of the
23 door. Now, you had the testimony of
24 Mr. Costanza, also with the Sheriffs'
25 office, who told you that on the second

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OFFICIAL REPORTER, U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

116

Prosecutor's Summation, 7-20-77.

1 occasion he was in the surveillance
2 car and that he was listening to the
3 tape as it was being made, that he
4 could hear it as it was going on in
5 real life, and he tells you that what
6 he heard in real life and what he
7 heard on the tape earlier were the
8 same, there were no gaps, no omissions,
9 nothing missing. In order to believe
10 Mr. Jones you have to find that Mr.
11 Costanza is not telling the truth.
12 You also have to find that Mr. Petronella
13 is lying. You also have to find that
14 Mr. Shortall is lying. And you also
15 have to find that Mr. O'Neil is lying.
16 And you have to find that the tapes
17 are unreliable in order to believe Mr.
18 Jones. You balance that evidence
19 and you decide who you're going to
20 believe here.

21 Now, there was one other thing
22 I wanted to mention briefly. Mr.
23 Jones testified that on the first
24 occasion Mr. Petronella came by with
25 not Jimmy Riley, a man he doesn't even

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OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

117

Prosecutor's Summation, 7-20-77.

1 know, but a fellow by the name of
2 Ronnie Manns. He described Ronnie
3 Manns as a tall slender black male
4 in his twenties with a receding hair-
5 line. You heard Mr. Manns testify.
6 We brought him in here. He was
7 contacted last night and asked about
8 the incident and he said to you that
9 he didn't know anything about it, he
10 was simply not there. Now, I cannot
11 apologize nor somehow excuse the fact
12 that Mr. Manns was imprisoned for an
13 offense he committed, that's just the
14 way it is, and he has had some problems
15 with the law and I don't dispute that,
16 I didn't even hide it, I asked him
17 about it, I asked him to tell us as
18 best he could. He was nervous, you
19 saw that. And I think he might be
20 nervous because he was pulled out
21 of the jail and brought into Federal
22 Court with basically no knowledge
23 of what's going on, no warning. He
24 was asked about an event that he
25 knows nothing about, naturally he was

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WESTERN DISTRICT OF NEW YORK

118

Prosecutor's Summation, 7-20-77.

1 nervous, and he was hesitant and
2 scared. I can see that he's not an
3 ideal witness, you wouldn't make an
4 example of him. But I submit to you
5 that Mr. Jones, once again, was caught
6 with a story that cannot be tested
7 against any of the facts. His story
8 stands by itself. He can bring nothing
9 in really of any real substance to
10 support it. And you heard Mr. O'Neill
11 testify this morning that he was
12 present at the first transaction as
13 a surveilling agent, his job was to
14 watch, to be there for protection and
15 surveillance, that he watched Mr.
16 Petronella pull up in a car with
17 Jimmy Riley and Jimmy Riley walked
18 in the store, came out and that Mr.
19 Petronella went in alone. So in
20 order to believe Mr. Jones that Ronnie
21 Manns was there you have to find that
22 Mr. Petronella is a liar, you have
23 to throw out the tape, and you have
24 to find that Mr. Manns is a liar, and
25 you might well be justified to find

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WESTERN DISTRICT OF NEW YORK

119

Prosecutor's Summation, 7-20-77.

1 that he is a criminal because he is
2 in jail and you might well be justified
3 to find that he was scared and that
4 he's not very intelligent and that
5 he's nervous, but I submit to you
6 that he is not a liar, he has no
7 reason to lie about whether he knows
8 Mr. Jones nor the agents.

9 I would also like to comment
10 briefly on the fact that Mr. Jones
11 called as his witnesses or his attorney
12 did a friend of his, his wife, his
13 ex-wife, excuse me, his business
14 partner, and they said essentially
15 that Mr. Jones, so far as I know,
16 has a good reputation. Well, he
17 called his friends, and if you called
18 your friends and asked them to tell
19 the jury am I nice, do you like me,
20 am I your friend, do I have a good
21 reputation, your friends would say
22 yes. You wouldn't call people who
23 wouldn't say that. They all had
24 connections with him, they're all
25 social friends of his, his wife

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Prosecutor's Summation, 7-20-77.

1 naturally is going to say that, his
2 business partner Mr. Buckley, the
3 real estate agent, she's going to
4 say that about him, of course. I'm
5 not about to challenge them saying
6 that but I suggest you that that is
7 not the issue in this case. What I
8 am asking you to do, ladies and
9 gentlemen, is this, it's the
10 Government's position that Mr. Jones
11 was ripe to commit a crime. Perhaps
12 he wouldn't have committed a lot of
13 crimes but he was ready and willing
14 and able, he was predisposed to buy
15 those food stamps. Every other bit
16 of evidence except Mr. Jones himself
17 points to that conclusion. All the
18 other agents and the tapes all point
19 to that particular conclusion. Only
20 Mr. Jones says, "I want not predisposed
21 to do it, I wouldn't have done it, I
22 thought I was being robbed, I didn't
23 want to do it.", And I'm asking you
24 to take Mr. Jones' testimony effectively,
25 I hate to see this, but simply throw

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WESTERN DISTRICT OF NEW YORK

121

Prosecutor's Summation, 7-20-77.

1 it out the window and let it glide
2 down to Niagara Square and rest
3 quietly. I'm asking you to believe
4 the testimony of the agents and I'm
5 asking you to listen to those tapes
6 if you want, think back on them, and
7 I'm asking you to find Mr. Jones was
8 more than ready to commit this crime
9 at the time. The agents walked in
10 but he was ripe, he was predisposed
11 to it, and I'm asking you to reject
12 his defense that he was entrapped into
13 it, and I'm asking you to return a
14 verdict of guilty on both of the
15 two Counts.

16 Thank you.

17 THE COURT:

Mr. Costa.

18 MR. COSTA:

19 At this particular point in the
20 role of the defense counsel I have
21 the responsibility as Mr. Wagner had
22 on behalf of the people which is to
23 review the evidence, and as his Honor
24 has told you, of course, our review
25 of the evidence and our review of
what transpired in this trial is

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

Judge Elfvin's instructions to the jury, 7-20-77.

1 all, you do it as a civic responsibility,
2 you do it because it's your job, but
3 some of us try to avoid it, you didn't,
4 and for that I certainly respect you
5 because you're playing a very important
6 role in the life of a fellow citizen,
7 so for that sense of duty I thank you.
8 When you go back to deliberate after
9 you hear the law, come out with a
10 verdict that the evidence requires,
11 and I assure you Mr. Jones and I will
12 have to live with that verdict and I
13 trust it will be not guilty.

14 Thank you very much. I just hope
15 I haven't bored you.

16 THE COURT:

17 Charge to
18 jury:

19 I will try not to be lengthy,
20 ladies and gentlemen. I do urge that
21 you pay attention to what I am saying
22 because you are to apply this as the
23 law in the case when you are deliberat-
24 ing. Now, it has been emphasized that
25 yours is the duty and your duty alone
to decide what the facts are and neither
of the attorneys has anything to do
with that other than to talk about them

Edna J. Paczynski

OFFICIAL REPORTER, U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

124

Judge Elfvin's instructions to the jury, 7-20-77.

1 as they have been. I have nothing to
2 do with deciding the facts. My sole
3 job is to tell you what the law is.
4 Now, during the trial I decided certain
5 motions, some of which you may have
6 heard or known the result of and others
7 you may not have and, of course, you
8 do know that from time to time I
9 sustained objections to questions which
10 were asked by the attorneys and I
11 refused to let the witness answer and
12 on a couple of occasions I told you
13 that something was stricken from the
14 record and you were to ignore it.
15 Now, you are not to consider any
16 question that was asked that I did
17 not permit to be answered, you are not
18 to consider any of the evidence that
19 I kept out or stricken from the case
20 because that is no part of the evidence.
21 Also you are not to read into anything
22 that I have said or any ruling I have
23 made on any objection, any inference
24 that I have anything in my mind about
25 how you should decide any of the facts

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WESTERN DISTRICT OF NEW YORK

125

Judge Elfvin's instructions to the jury, 7-20-77.

1 in the case or whether or not you
2 should find Mr. Jones guilty. And
3 even if you think that somewhere lurking
4 in some one of those indications
5 on my part there is such a feeling by
6 me, and I assure you as far as I can
7 look inwardly and evaluate myself there
8 is no such feelings but if you think
9 there is I tell you that you are to
10 ignore it and yours is to be the
11 determination on all of the facts
12 following these rules of law and
13 decide whether or not Mr. Jones is
14 guilty or innocent. You will be
15 returning two verdicts because there
16 are two counts and you will have to
17 treat each of those counts separately
18 even though the type of crime that is
19 alleged in each one is exactly the
20 same but you do have to weigh Count I,
21 which I will read to you, and weigh
22 Count II and decide whether Mr. Jones
23 is guilty or not guilty as to each
24 one. Your verdict as to guilt or
25 innocence on one count is not to be

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OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

126

Judge Elfvin's instructions to the jury, 7-20-77.

determinative of your decision on
the other count.

Mr. Jones is charged in this
indictment in these two separate
counts with having violated a parti-
cular section of one part of the
United States Code, particularly
Section 2023(b) of Title 7. You
don't have to worry about that, I
will tell you what that law is,
but that particularly is what he is
charged with in each count. He is
charged with having knowingly acquired
and possessed food stamps, and you
will find that in the text of the
indictment, I will deal with that
possession aspect a little bit
later, having acquired and possessed
food stamp coupons having a value in
excess of one hundred dollars in a
manner not authorized by Chapter
51 of Title 7 of United States Code
or by the regulations which have been
issued thereunder, and each of the
counts deals with a violation of that

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 same statute and the only difference
2 is to the date involved and the
3 amount of the food stamp coupons involved.
4 You will have a copy of the indictment
5 with you in the jury room so you can
6 refer to those two counts. As I say,
7 you will deal with each count separately.

8 Now, Count I says that on or
9 about the 25th day of February 1977
10 in the Western District of New York,
11 and that is an area of seventeen counties
12 in this end of New York State and it
13 includes Erie County, that Ray Jones
14 knowingly did acquire and possess food
15 stamp coupons having a value in excess
16 of one hundred dollars in a manner not
17 authorized by Chapter 51 of Title 7
18 of United States Code or the regulations
19 issued pursuant thereto in that Ray
20 Jones did purchase from Joseph Petronella,
21 Detective, Erie County Sheriffs' Depart-
22 ment, food stamp coupons with an
23 aggregate face value of five hundred
24 dollars and gave in exchange one hundred
25 and fifty dollars United States currency

Judge Elfvin's instructions to the jury, 7-20-77.

1 all in violation of Title 7, United
2 States Code, Section 2023(b). And
3 Count II as I say paralleling that,
4 the allegation is that the event
5 occurred on or about February 28th
6 1977, again in the Western District
7 of New York, and he is charged with
8 knowingly having acquired and possessed
9 food stamp coupons having a value in
10 excess of one hundred dollars and in
11 a manner not authorized by that same
12 part of the law that I referred to
13 in Count I or by regulations in that
14 he did purchase again from Joseph
15 Petronella food stamp coupons with an
16 aggregate face value of two hundred
17 dollars and gave in exchange sixty-
18 five dollars in United States currency,
19 again in violation of that same section
20 of the Code.

21 Now, it has been emphasized to you
22 and I emphasize to you again that the
23 indictment is only a formal method that
24 we use in our courts to accuse a
25 defendant of a crime. It is not evidence

Judge Elfvin's instructions to the jury, 7-20-77.

1 of any crime against the defendant
2 and you are not to consider it as
3 any indication of his criminality,
4 it merely tells him and you what he
5 is charged with.

6 Now, Defendant is guilty of this
7 crime if other elements being proven,
8 and I will tell you what those elements
9 are, he acquired or possessed the
10 food stamps, however, there is not in
11 the Government's proof or elsewhere
12 in the total evidence that is before
13 you in this case anything relating to
14 the Defendant's possession of the
15 stamps separate and apart from his
16 alleged acquisition of them, and
17 consequently you are not to concern
18 yourself with any other aspect of
19 possession or with possession in
20 and by themselves. If you find that
21 he acquired them you will of necessity
22 have found that he had at least that
23 momentary possession but acquisition
24 is what you will be dealing with and
25 you can ignore the allegation of the

Judge Elfvin's instructions to the jury, 7-20-77.

1 charge of possessing. The particular
2 section that I had talked about,
3 Section 2023(b) says in pertinent part
4 whoever knowingly acquires coupons in
5 any manner not authorized by this
6 chapter or the regulation issued
7 pursuant to this chapter shall if such
8 coupons have the value of one hundred
9 dollars or more be guilty of an offense
10 against the laws of the United States.
11 The chapter referred to there is the
12 Chapter 51 that is referred to in the
13 two counts of the indictment.

14 Now, there are basically four
15 essential elements, each of which
16 has to be proven by the Government
17 beyond a reasonable doubt, and that
18 beyond a reasonable doubt is a phrase
19 that I will define for you a little
20 bit later, and you will find that I
21 am using it from time to time. Each
22 element has to be proven beyond a
23 reasonable doubt in order to establish
24 the offense which is charged in each
25 of these counts of the indictment.

Judge Elfvin's instructions to the jury, 7-20-77.

1 Now, the first element is that the
2 Defendant Mr. Jones acquired food
3 stamp coupons as is charged in the
4 indictment. And, secondly, that he
5 acquired such coupons in a manner
6 not authorized by the Food Stamp Act
7 of 1964 as amended and the regulations
8 thereunder. And thirdly, that such
9 coupons were of the value of a hundred
10 dollars or more. And fourthly, that
11 the Defendant did these acts or act -
12 did such act or acts, rather, knowingly.
13 Now, you keep in mind that the burden
14 is always on the Government, the
15 prosecution, to prove beyond a reason-
16 able doubt each essential element of
17 the crime charged in each count of the
18 indictment, that the law never imposes
19 upon the Defendant Mr. Jones the
20 burden or duty of calling any witnesses
21 or producing any evidence. He has, as
22 you know, taken the witness stand
23 himself and has produced other evidence
24 but nevertheless the basic rule obtains.
25 There is in this case a fifth element

Judge Elfvin's instructions to the jury, 7-20-77.

1 which must be proven and that namely
2 is that the Defendant was not entrapped
3 into the commission of the crime. The
4 Government can accomplish this showing
5 by placing before you evidence which
6 satisfies you beyond a reasonable
7 doubt either that the Government
8 Agents, which includes here the officers
9 of the Erie County Sheriffs Department,
10 did not cause the Defendant to violate
11 this law or that the Defendant was
12 willing and predisposed to violate
13 the law. Now, an act or a failure to
14 act - an act really in this case is
15 all we are dealing with, not a failure
16 to act, an act is knowingly done if
17 it's done voluntarily and intentionally
18 and not because of mistake or accident
19 or other innocent reason, and the
20 purpose of including the word knowing
21 or knowingly was to insure that no
22 one would be convicted of a crime
23 because of an act which is done pursuant
24 to some mistake or accident or other
25 innocent reason. The Food Stamp Act

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 of 1964 as amended provides in pertinent
2 part that coupons shall be issued only
3 to households which have been duly
4 certified as eligible to participate
5 in the Food Stamp Program, and I tell
6 you that under the law food stamps
7 such as we have had evidence of are
8 coupons within the meaning of that
9 statute, further the State agency
10 of each participating State shall
11 assume responsibility for the certifi-
12 cation of applicant household and for
13 the issuance of coupons. The regula-
14 tions of the United States Department
15 of Agriculture under this statute
16 provide the State agency shall provide
17 for certification of households by
18 completion of the application for
19 participation. The Act itself further
20 provides that coupons issued to eligible
21 households shall be used by them only
22 to purchase food in retail food stores
23 which have been approved for participa-
24 tion in the Food Stamp Program at
25 prices prevailing in such stores. The

Judge Elfvin's instructions to the jury, 7-20-77.

1 term household is defined to mean a
2 group of related individuals living as
3 one economic unit sharing common cook-
4 ing facilities and for whom food is
5 customarily purchased in common or a
6 single individual living alone who has
7 cooking facilities and purchases and
8 prepares food for home consumption.
9 And again, to wind up the definition
10 of terms for you, the term coupon vendor
11 means any person, partnership, corpora-
12 tion, organization political subdivision
13 or other entity with which a State
14 agency has contracted for or to which
15 it has delegated administrative responsi-
16 bility in connection with the issuance
17 of coupons to households. If you find
18 beyond a reasonable doubt that the
19 Defendant acquired these food stamp
20 coupons without being duly certified
21 as eligible for such coupons upon
22 completion of an application for
23 participation or that the Defendant
24 acquired these food stamp coupons
25 from someone other than the State

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WESTERN DISTRICT OF NEW YORK

/35

Judge Elfvin's instructions to the jury, 7-20-77.

1 agency or a coupon vendor delegated
2 by the State agency to issue the
3 coupons then you may find the element
4 of acquiring such coupons in a manner
5 not authorized by the Act or by the
6 regulations.

7 Now, I have mentioned as one
8 element the finding by you of a value
9 of food stamps in excess of one hundred
10 dollars. There is in this circumstance
11 a separate crime, what we call a lesser
12 included crime that if you find that
13 the stamps did not have a value in
14 excess of one hundred dollars. Now,
15 the law permits you to find the
16 Defendant guilty of any such lesser
17 offense which is necessarily included
18 in the offense which is charged in the
19 indictment and whenever such a course
20 is consistent with the facts found by
21 you from the evidence in the case and
22 with the law that I am giving to you.
23 So if you should unanimously find the
24 Defendant not guilty of the crimes
25 charged in the indictment then if that

Judge Elfvin's instructions to the jury, 7-20-77.

1 result is reached because of the dollar
2 value involved you must separately
3 proceed to determine his guilt or
4 innocence of the lesser offense, namely
5 whether or not he has been guilty of
6 dealing in food stamps in an illegal
7 manner in and about which is not in
8 excess of one hundred dollars. Now,
9 the offense which is charged in each
10 count of the indictment, that is
11 acquiring the food stamp coupons having
12 a value of one hundred dollars or more,
13 and I think that I must - I think in
14 my statement before I said having a
15 value in excess of one hundred dollars,
16 actually if you find it a value of one
17 hundred dollars or more that would
18 satisfy the indictment, the lesser
19 included offense would be for a value
20 of less than one hundred dollars. Now,
21 if you find that he acquired food
22 stamp coupons with a value of one
23 hundred dollars or more in any manner
24 not authorized by the Food Stamp Act
25 or the regulations that offense necessaril

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OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

137

Judge Elfvin's instructions to the jury, 7-20-77.

1 includes the lesser offense of the
2 same acts or the same intent, the same
3 other elements but involving food
4 stamp coupons with a value of less
5 than a hundred, so when you're determin-
6 ing criminality in this case and coming
7 to the element of value you would
8 decide whether the stamps involved
9 has a value of a hundred dollars or
10 more or has the value of less than one
11 hundred dollars and your verdicts would
12 report that to me.

13 Now, the Defendant Mr. Jones
14 asserts and his counsel Mr. Costa has
15 been frank enough with you of indicating
16 that in his mind that this is the sole
17 issue you have to decide or the main
18 issue, he says that he was a victim of
19 entrapment as to the offense which is
20 charged in each of these counts. Now,
21 if you find some evidence of Government
22 initiation of the Defendant's conduct
23 then you must further find that the
24 Government - find whether the Government
25 has proven beyond a reasonable doubt

Judge Elfvin's instructions to the jury, 7-20-77.

1 that the Defendant was ready and willing
2 to commit the crimes charge in each
3 count of the indictment. I have
4 included that as a fifth element of
5 what you must find in each count if
6 you are to find guilt and tell you
7 that you must determine that issue
8 of entrapment. You must determine
9 whether the Government has proven
10 beyond a reasonable doubt that
11 entrapment was not present. Now,
12 where Defendant has no previous
13 intent or purpose to violate the law
14 but is induced or persuaded, not forced
15 or pressured or invited, but induced
16 or persuaded by law enforcement officers
17 or their agents to commit a crime he
18 is a victim of entrapment and the law
19 forbids his conviction in such case.
20 Now, on the other hand, where the
21 Defendant already has the readiness
22 and the willingness to break the law
23 the mere fact that Government agents
24 provide what appears to be a favorable
25 opportunity is not entrapment. Now,

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WESTERN DISTRICT OF NEW YORK

139

Judge Elfvin's instructions to the jury, 7-20-77.

1 there's been evidence of Defendant's
2 character, good character, and you
3 can give to that evidence whatever
4 weight you think it should have in
5 your deciding whether or not the
6 Defendant was ready and willing. Now,
7 if you find that the Government has
8 proved beyond a reasonable doubt from
9 the evidence in the case that before
10 anything at all occurred respecting
11 the alleged defenses involved in this
12 case that the Defendant Ray Jones was
13 ready and willing to commit the crimes
14 which are charged whenever the opportunity
15 was afforded and that the Government
16 officers and agents did no more than
17 offer the opportunity then you will
18 find that the Defendant was not a
19 victim of entrapment. Now, on the other
20 hand if the evidence presented by the
21 Government in this case leaves you
22 with a reasonable doubt whether the
23 Defendant had the previous intent or
24 purpose or as we call it sometimes
25 predisposition to commit the offenses

Judge Elfvin's instructions to the jury, 7-20-77.

2 charged in the indictment apart from
3 the inducement or persuasion of some
4 officer or agent of the Government
5 then you would find the Defendant
6 not guilty. You are not to consider
7 the telephone conversations of March
8 8th and March 9th between Detective
9 Petronella and the Defendant if you
10 believe that they occurred, and of
11 course there is conflicting evidence
12 as to that, as any proof of the
13 Defendant's readiness and willingness
14 to acquire food stamps illegally on
15 February 25 or February 28. You must
16 resolve the issue of entrapment separately
17 as to the February 25 transaction and
18 as to the February 28 transaction.
19 Obviously there is a factual relation-
20 ship between the two events. If you
21 find that the Government has failed to
22 prove beyond a reasonable doubt that
23 there was no entrapment on February
24 25 you can if you want infer such
25 failure as to the February 28 event.
You might, on the other hand, infer

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WESTERN DISTRICT OF NEW YORK

H1

Judge Elfvin's instructions to the jury, 7-20-77.

1 that the Defendant's involvement on
2 February 25 even if entrapped shows
3 his disposition and willingness to
4 violate the law on February 28. Now,
5 there are certain rules of law which
6 are common to all criminal cases.
7 I have mentioned some. You must
8 apply these in reviewing the evidence
9 which you have before you. The basic
10 rule in all criminal cases is that the
11 Defendant is presumed to be innocent
12 and that presumption of innocence
13 remains with the Defendant throughout
14 this trial and it continues to exist
15 until such time as each of you is
16 convinced beyond a reasonable doubt
17 by legal and competent evidence that
18 the Defendant is guilty of the offense
19 or offenses charged. The burden of
20 proof that a person is guilty beyond
21 a reasonable doubt rests with the
22 Government at all times and never shifts
23 to the Defendant. In order to sustain
24 its burden the Government must present
25 proof which is sufficiently strong to

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OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

142

Judge Elfvin's instructions to the jury, 7-20-77.

1 convince each of you of the Defendant's
2 guilt beyond a reasonable doubt. Now,
3 the requirements that the prosecution
4 prove Defendant's guilt beyond a
5 reasonable doubt extends to every
6 essential element of the crime or
7 crimes with which he has been charged.
8 However, in determining whether the
9 guilt of the Defendant as to each and
10 every element has been established
11 beyond a reasonable doubt you are not
12 limited to the proof of the Government's
13 witnesses. If you are satisfied from
14 a review of all of the evidence in the
15 case, both the Government's and the
16 Defendant's, that the evidence as to
17 a particular count establishes guilt
18 beyond a reasonable doubt then you may
19 convict the Defendant on that count.
20 On the other hand, if you have a reason-
21 able doubt at any point with respect to
22 a particular count under consideration
23 then you must acquit the Defendant on
24 that count. I tell you again that you
25 will separately weigh and determine the

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WESTERN DISTRICT OF NEW YORK

143

Judge Elfvin's instructions to the jury, 7-20-77.

1 evidence as to each count, you have to
2 determine the Defendant's guilt or
3 innocence as to each count of the
4 indictment separately.

5 I mentioned reasonable doubt and
6 I promised to define it. A reasonable
7 doubt is a doubt which is based upon
8 reason and common sense and which arises
9 from the state of the evidence. Now,
10 of course, it's rarely possible to
11 prove anything to an absolute certainty
12 so proof beyond a reasonable doubt is
13 established if the evidence is such
14 as you would be willing to rely upon
15 and to act upon in the most important
16 of your own affairs. A Defendant is
17 not to be convicted upon mere suspicion
18 or upon conjecture. A reasonable doubt
19 can arise not only from the evidence
20 produced but it can also arise from the
21 lack of evidence. The burden is upon
22 the prosecution to prove beyond a
23 reasonable doubt that the Defendant
24 is guilty of every essential element
25 of each crime and the Defendant has the

Judge Elfvin's instructions to the jury, 7-20-77.

1 right to rely upon any failure of the
2 prosecution to establish such proof.
3 Now, in this sense you really will not
4 be determining Defendant's innocence
5 but you really will be determining
6 whether or not the Government has proven
7 beyond a reasonable doubt that he is
8 guilty. Defendant may also rely upon
9 the evidence which was brought out
10 upon cross examination of the witnesses
11 for the prosecution just as the Govern-
12 ment can rely upon evidence brought
13 about on cross examination of the
14 defense witnesses. I emphasize again
15 the law does not impose upon Defendant
16 the burden or duty of producing any
17 evidence and even though he has taken
18 the stand and has put in some evidence
19 you have to determine basically whether
20 the Government has carried its burden
21 of proving each element beyond a
22 reasonable doubt. Remember, however,
23 a reasonable doubt is such a doubt as
24 based upon reason and as appeals to
25 your power of logic. It's a doubt which

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

145

Judge Elfvin's instructions to the jury, 7-20-77.

1 arises out of something tangible in
2 the evidence in the case or something
3 lacking in the case, and you have to
4 distinguish it from a doubt which might
5 be based upon some emotion such as upon
6 a whim or upon a fancy. It's a doubt
7 for which you have a reason. Sometimes
8 people are not able to put into words
9 those reasons and that is not determina-
10 tive of whether or not you have a reason.
11 but in your mind you must have a tangi-
12 ble - a reason that arises from something
13 that is tangible in the evidence or
14 something that is left out of the
15 evidence. Now, if you feel uncertain
16 and you are not fully convinced that
17 the Defendant is guilty of the crime
18 charged and if you believe that you are
19 acting in a reasonable manner and you
20 believe that a reasonable man or woman
21 in any manner of like importance would
22 hesitate to convict because of a doubt
23 that you have that is a reasonable
24 doubt and Defendant is entitled to
25 its benefit. If you have such a doubt

Judge Elfvin's instructions to the jury, 7-20-77.

1 you must acquit, you must find Ray
2 Jones not guilty. Now, reasonable
3 doubt in your mind as to any essential
4 element of either crime entitles the
5 Defendant to acquittal of that crime.
6 Now, this does not mean that the
7 Government must prove every essential
8 element of the crime beyond a reasonable
9 doubt and it does not mean that - excuse
10 me - let me restate that. That was a
11 misstatement. The rule is, of course,
12 the Government must prove every
13 essential element beyond a reasonable
14 doubt, I re-emphasize that, but that
15 rule does not mean that you have to
16 believe the testimony of every Govern-
17 ment witness as being true beyond a
18 reasonable doubt or that every piece
19 of evidence that the Government has
20 offered is true beyond a reasonable
21 doubt. It only means that the credible
22 evidence as weighed and found by you
23 under these instructions and viewed as
24 a whole must establish every essential
25 element of the crime and the Defendant's

Edna J. Paczynski

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 guilt beyond a reasonable doubt. Now,
2 as the sole judges of the facts you
3 have to determine which of the witnesses
4 you believe, what portion of their
5 testimony you accept, and what weight
6 you attach to it. Now, as I mentioned
7 before that I sustained objections to
8 questions about permitting answers
9 and sometimes I struck testimony and
10 you are not to draw any inference from
11 an unanswered question and you cannot
12 consider testimony which has been
13 stricken. Your decision has to be
14 made solely upon the competent evidence
15 before you and what I have kept out
16 or stricken is not before you.

17 Now, there are two types of
18 evidence generally which you can consider
19 in deciding whether the Government has
20 proven Defendant guilty and some of
21 this proof consists of the testimony
22 of those who have witnessed the Defen-
23 dant's conduct or heard his statement
24 and have testified to that conduct or
25 statement in the course of trial and

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 this is what we call direct evidence
2 or eyewitness evidence. On the other
3 hand, the proof of the chain of circum-
4 stances may point to the commission of
5 an offense by the Defendant and this
6 we would call circumstantial evidence.
7 You are entitled to consider and find
8 that both types of evidence, direct
9 and circumstantial, bear on the question
10 of innocence or guilt of the Defendant.
11 As a general rule the law makes no
12 distinction between direct and circum-
13 stantial evidence but simply requires
14 that before convicting the Defendant
15 you be satisfied of his guilt beyond a
16 reasonable doubt. I mentioned that
17 there was evidence of character in
18 the case and where a Defendant has
19 offered evidence of good general repu-
20 tation for truth and veracity or honesty
21 and integrity you should consider such
22 evidence along with all the other
23 evidence in the case. Evidence of a
24 Defendant's reputation inconsistent
25 with those traits of character

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 ordinarily involved in the commission
2 of a crime charged may give rise to a
3 reasonable doubt because you may think
4 it improbable that a person of good
5 character in respect to those traits
6 would commit such a crime. However,
7 whether or not you do so construe or
8 interpret it is completely up to you.
9 We have had tape recordings, two tape
10 recordings of conversations put in
11 evidence. These tape recordings have
12 been identified by witnesses and trans-
13 cripts have been furnished for your
14 guidance as you listen to the tapes
15 and to help you identify the respective
16 speakers. The tapes themselves,
17 however, are the evidence in the case
18 and the transcripts themselves are not
19 evidence. If you perceived any varia-
20 tion between what you heard on the
21 tapes and what you saw on the transcripts
22 you are to rely solely upon what you
23 heard on the tapes and you are to
24 disregard what you saw on the trans-
25 cripts. Now, while you will have the

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 other exhibits with you in the jury ,
2 room for your reference you will not
3 have the tapes there because you will
4 not have in the jury room any facility
5 for playing them and you will not have
6 the transcripts because they are not
7 in evidence. If you want to refer to
8 either tape or find out again what is
9 on either one we will arrange to replay
10 it or them for you. Now, you are permitted
11 to draw from one fact, the existence of
12 another if reason and experience support
13 the inference, that is to say you can
14 draw from facts which you find to have
15 been proven by the evidence as such
16 reasonable inferences as seem justified
17 by reason and logic in light of your own
18 experiences in life. Now, basically
19 an inference is nothing more than a
20 deduction or conclusion which reason
21 and common sense leave you to draw from
22 the facts which have been proven. Any
23 inference which you draw must reasonably
24 flow from the evidence and it must be
25 based upon facts established by the

Judge Elfvin's instructions to the jury, 7-20-77.

1 evidence. And because a permissible
2 inference in law must flow naturally
3 and logically from and be based upon
4 facts established by the evidence it
5 follows that you may not base further
6 inferences merely on inferences already
7 drawn. One inference cannot be based
8 upon or drawn from another inference,
9 it must be based upon and drawn from
10 facts proved by the evidence. Now,
11 if in the course of your deliberation
12 your consideration of all of the
13 evidence you find that certain evidence
14 admits or lends itself to two inferences,
15 one of which supports innocence of the
16 Defendant and the other which supports
17 guilt of the Defendant, you must accept
18 the inference supporting innocence and
19 you must reject the inference supporting
20 guilt. So there must be intent on the
21 part of the Defendant. Intent is the
22 purpose or aim or state of mind with
23 which a person acts in this case or
24 in other cases fails to act. An act
25 is knowingly done if it is done voluntaril.

Judge Elfvin's instructions to the jury, 7-20-77.

1 and intentionally and not because of
2 mistake or accident or other innocent
3 reason. An intent you would recognize
4 may and probably must be proved by
5 indirect or circumstantial evidence
6 because while witnesses may see and
7 hear or may be so be able to give
8 direct or eyewitness evidence of what
9 a person does or says there can be,
10 of course, no eyewitness account of
11 the state of mind in which the acts
12 were done or the statements made.
13 But what a person does or says may
14 indicate either intent or lack of
15 intent to act. Now, unless otherwise
16 instructed in determining any issue
17 involving intent you may consider all
18 of the facts and circumstances in the
19 case which aid you to determine state
20 of mind. Again, I refer to the testimony
21 concerning the telephone conversations
22 allegedly had between Detective Petronella
23 and the Defendant on March 8 and March
24 9 and admonish you again, of course,
25 it is up to you to believe whether they

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 occurred and what the content was, but
2 that testimony bears only upon the
3 issues of the Defendant's intent on
4 February 25 and/or February 28, his
5 knowledge as of those earlier dates
6 and his motives as of either or both
7 of those dates and you cannot consider
8 those telephone calls in deciding
9 whether on those dates the Defendant
10 had a disposition or willingness to
11 commit the criminal acts.

12 Now, another important thing
13 you must do as jurors is to decide
14 the credibility, the believability
15 of witnesses and the weight their
16 testimony deserves. Again, you are
17 the sole judges as to credibility and
18 as to weight. You should carefully
19 scrutinize the testimony which is
20 given and the circumstances under which
21 each witness has testified and every
22 other matter in evidence which tends
23 to indicate whether or not the witnesses
24 are worthy of belief. The witness in
25 the course of his testimony may have

Judge Elfvin's instructions to the jury, 7-20-77.

1 acknowledged a criminal record or admitted
2 other unlawful or reprehensible conduct
3 or activities, admitted lying in the
4 past, and so forth, and naturally you
5 would cautiously and carefully weigh
6 all of such facts and circumstances
7 to determine the effect, if any, that
8 those facts and circumstances may have
9 upon that witness's believability.
10 Now, similarly you may consider any
11 bias or prejudice demonstrated by a
12 witness or - I think we had none of
13 this here but sometimes there is a
14 demonstrated hope of leniency or
15 reward to be gained through testifying,
16 Mr. Costa made some implication in
17 that direction as to one witness. Now,
18 this is not to say that because a given
19 witness may be a rather unsavory
20 character in some respects that you
21 may not credit his testimony on the
22 stand. You have to judge each witness's
23 intelligence and motive and state of
24 mind and his demeanor and manner while
25 on the stand and also have in mind the

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WESTERN DISTRICT OF NEW YORK

155

Judge Elfvin's instructions to the jury, 7-20-77.

1 relation that each witness may bear
2 to either side of the case and the
3 manner in which each witness may be
4 affected by the verdict and the
5 extent to which, if at all, each
6 witness is either supported or contra-
7 dicted by other evidence. Now, the
8 mere fact that the testimony of a
9 witness is inconsistent or that there
10 are discrepancies in the testimony
11 does not mean that you have to reject
12 the witness's credibility and you must
13 determine whether the inconsistency or
14 discrepancy is the result of falsifica-
15 tion or whether on the other hand it
16 is a result of innocent miscalculation
17 or inaccurate observation or memory.
18 In evaluating credibility you will,
19 of course, determine whether or not
20 the testimony of a given witness is
21 inherently improbable or contradictory
22 with respect to any material fact as
23 judged by other evidence in the case.
24 We had police officers, deputy sheriffs
25 on the witness stand and the testimony

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WESTERN DISTRICT OF NEW YORK

156

Judge Elfvin's instructions to the jury, 7-20-77.

1 of such a person should be weighed
2 the same as that of any other witness
3 and their testimony does not deserve
4 either greater or lesser believability
5 simply because it comes from a police
6 officer. You have to judge such testi-
7 mony the same as you would the testimony
8 of other witnesses. Now, if you do find
9 that a witness has testified falsely
10 or has lied with respect to any material
11 portion of his testimony, his or her
12 testimony, you may disregard that
13 portion which you find to be unbeliev-
14 able and rely upon that which you find
15 to be believable or you may if you want
16 disregard the entire testimony of that
17 witness. Now, in that connection a
18 witness does not testify falsely or
19 lie if he or she testifies incorrectly
20 or in error merely by reason of inad-
21 vertence or misrecollection or mistake
22 or other innocent reason. Now, you
23 are instructed as a matter of law that
24 you are not to be influenced by the
25 fact that the Government of the United

Judge Elfvin's instructions to the jury, 7-20-77.

1 States is a party to this action.
2 The Government is the prosecutor, Mr.
3 Wagner is the prosecuting attorney.
4 I tell you also that it is your duty
5 merely to determine whether the
6 Government has proven the Defendant
7 guilty. You are not to concern your-
8 self in any way with the punishment
9 that he may receive if he is convicted.
10 Punishment is a matter which only I
11 should be concerned and, of course,
12 I would only be concerned if you do
13 convict the Defendant of one or more
14 of the crimes of which he is charged.

15 Again I stress that only you are
16 to find the facts, any factual indica-
17 tion or examples that I have given are
18 not meant to and should not be taken
19 to indicate any opinion on my part as
20 to how you should find on any issue
21 of fact or whether you should acquit
22 or convict the Defendant. These are
23 matters solely for you.

24 I remind you as we began this
25 case you took an oath that you would

Judge Elfvin's instructions to the jury, 7-20-77.

1 well and truly try the issues which
2 are joined in the case and a true
3 verdict given according to the evidence
4 so help you God. I suggest to you
5 that if you follow that oath and you
6 try the issues without combining your
7 thinking with any emotion that you will
8 arrive at a true and just verdict.
9 But it must be clear to you that once
10 you get into an emotional state and
11 you let bias or sympathy or prejudice
12 interfere with your thinking that you
13 will not arrive at a true and just
14 verdict. As you deliberate, ladies
15 and gentlemen, please be careful to
16 listen to the opinions of the other
17 jurors and ask for an opportunity to
18 express your own views, and no one
19 juror holds the center stage in the
20 jury room and no one juror controls
21 or monopolizes the conversations and
22 deliberations. Now, after you have
23 listened to the other jurors and after
24 stating your own views you become con-
25 vinced that your view is wrong don't

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WESTERN DISTRICT OF NEW YORK

Judge Elfvin's instructions to the jury, 7-20-77.

1 hesitate because of stubbornness or
2 pride or opinion to change your view
3 but, on the other hand, do not surrender
4 your honest conviction merely because
5 you are outnumbered. Your verdict must
6 be unanimous, it must represent the
7 absolute conviction of each one of you
8 and, of course, I refer to your verdict
9 on each of the two counts. Your verdict
10 as to guilt or innocence which as I
11 have said means actually not proven
12 guilty of the Defendant on each count
13 of the indictment has to be reached
14 unanimously with all twelve of you
15 agreeing on the result. You will have
16 a copy of the indictment in the jury
17 room. I have marked this Court Exhibit
18 A, and don't give it any particular
19 standing or credance just because it
20 is a Court Exhibit, it is no evidence
21 at all, it doesn't mean anything, it
22 doesn't prove anything, it merely frames
23 for you as it did for Mr. Jones the
24 charges which he has. Now, as you reach
25 the jury room and commence your

Judge Elfvin's instructions to the jury, 7-20-77.

1 deliberations as the first order of
2 business you should select one of your
3 number to speak for you. When you come
4 into the court room or when you have
5 to get in touch with me and any communi-
6 cation from the room will be by a
7 note which you will write out and hand
8 to the Deputy Marshall who will be on
9 duty outside the jury room. Don't ask
10 the Deputy Marshall anything about your
11 duties. If you have any question at
12 all write out a note and have it sent
13 to me. You can ask me questions, you
14 can request a clarification of my
15 instructions on the law or a reading
16 of my instructions or all or part of
17 the testimony of any witness or a
18 replaying of a tape or tapes. Use the
19 note also to tell me when you have
20 reached your verdicts or in appropriate
21 circumstances where you find yourself
22 so deadlocked that you are unable to
23 reach unanimity. Never tell me or
24 anyone else in a note or otherwise
25 how your voting stands at anytime except

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WESTERN DISTRICT OF NEW YORK

161

Judge Elfvin's instructions to the jury, 7-20-77.

1 when you finally do return a verdict
2 and then, of course, you would be
3 unanimously stating one way or the
4 other the guilt or innocence of the
5 Defendant as to each count.

6 Now, gentlemen, are there any
7 exceptions or requests and if so do
8 you wish to be heard outside the
9 presence of the jury?

10 MR. COSTA: I do, your Honor. I would like
11 to be heard outside the presence of
12 the jury.

13 THE COURT: Mr. Wagner.

14 MR. WAGNER: I have nothing, your Honor.

15 THE COURT: Again, I will just ask you to
16 step briefly in the hallway.

17
18 (Jury escorted from the court
19 room.)

20
21 THE COURT: Yes, Mr. Costa.

22 MR. COSTA: I have no exceptions, your Honor.
23 I do have some further requests to
24 charge that the elements of entrapment
25 occur that when the original criminal

Judge Elfvin's instructions to the jury, 7-20-77.

1 conduct is a product of the creative
2 activity of the law enforcement officials,
3 that is when the criminal plan originates
4 in the mind of the Government Agents
5 and not in the mind of the accused, I
6 would ask that you charge that.

7 THE COURT: All right. I will refuse that.
8 You may have an exception.

9 MR. COSTA: I will also ask your Honor to
10 charge that the issue of entrapment
11 having been presented the burden falls
12 on the prosecution to prove beyond a
13 reasonable doubt that reasonable grounds
14 existed for believing the accused was
15 engaged in the particular unlawful
16 activity charged.

17 THE COURT: I refuse that, and you may have
18 an exception.

19 MR. COSTA: Thank you, your Honor.

20 I will also ask your Honor to
21 charge that if you find that the
22 original sale was a product of the
23 creative activity of the law enforcement
24 officials you may also find that the
25 subsequent purchase was not an independent

Judge Elfvin's instructions to the jury, 7-20-77.

1 act but rather the course of conduct
2 flowing from the original inducement.

3 THE COURT: I have dealt with that in a
4 fashion that points out to the jury
5 that they may so construe it but they
6 need not so I refuse, I will refuse
7 yours which sort of says it must flow.

8 MR. COSTA: Yes, I understand, your Honor.
9 I am just pointing out to you how I
10 felt there might be some additional
11 instruction in that area.

12 THE COURT: Absolutely. I understand.

13 MR. COSTA: I also ask your Honor to charge
14 that if the informant's testimony
15 would tend to disprove the Defendant's
16 version of the facts it is the
17 responsibility of the Government to
18 produce the informant to testify in
19 the Government's behalf and that the
20 Defendant --

21 THE COURT: I did not deal with that. I
22 said in advance I might put something
23 in bearing upon that depending upon
24 your repsective arguments. I found
25 nothing in either argument that

Judge Elfvin's instructions to the jury, 7-20-77.

1 necessitated putting it in and, of
2 course, there is in the case no proof
3 that Mr. Riley is anymore available to
4 the Government than he is to the
5 defense and as a consequence absent
6 anything --
7 MR. COSTA: Your Honor, --
8 THE COURT: -- absent anything in the argument
9 I would not do it.
10 Now, what were you going to say?
11 MR. COSTA: I felt that your Honor said that
12 the informant was no more available
13 to the Government than to the defense?
14 THE COURT: That is right.
15 MR. COSTA: Well, I think the record is clear
16 and the testimony that has been adduced
17 and elicited from the witnesses that
18 the informant would not discuss the
19 case with me, the representative of
20 the Defendant, that he was the informant
21 who was present at the scene of the
22 initial act of commission, that he was
23 part of the inducing pattern which was
24 promulgated by the plan developed by
25 Mr. Shortall and Mr. Petronella and that

Judge Elfvin's instructions to the jury, 7-20-77.

1 he was part of the Government activity
2 and as such he was the Government's
3 witness and he was part of the Govern-
4 ment's case and never was part of the
5 Defendant's case because not only of
6 those factors but because we never
7 had a proper defense opportunity to
8 obtain, in affect, even like in a civil
9 trial the depositions, there is no way
10 in the world that I could in discharge
11 of my counsel responsibility under the
12 Sixth Amendment and also under this
13 particular factual concept call him to
14 the stand.

15 MR. COHEN:

Your Honor, --

16 THE COURT:

17 Well, we recognized, I think on
18 the record, the practical consideration
19 which you face and I think I even said
20 I did not know how myself would react
21 if I were in your position, nevertheless,
22 there is an assumption in the law and
23 on my part that if Mr. Riley were
24 called to the witness stand even by
25 the defense that his answers which, of
course, would be compelled would be not

Judge Elfvin's instructions to the jury, 7-20-77.

1 other than truthful.

2 MR. COSTA: Well, your Honor, there is no
3 evidence in this case that his testimony
4 would be cumulative.

5 THE COURT: I did not say that it would be.

6 MR. COSTA: No. But I am saying I'm pointing
7 this out, your Honor, --

8 THE COURT: Not cumulative but also not
9 necessary.

10 MR. COSTA: Yes, but, your Honor, if in
11 respect to the question of the proof
12 and the responsibility of the Government
13 to prove beyond a reasonable doubt
14 that we were not entrapped, I think it
15 was essential and the obligation of
16 the Government to put Mr. Riley on the
17 stand. Now, I tried in my summation
18 to stay away from inferring any mis-
19 conduct or lack of activity on the
20 part of the Government. It was not
21 the thrust of my summation.

22 THE COURT: I know you did. You took one
23 tentative step up the steps and pulled
24 your foot back.

25 MR. COSTA. Well, I didn't want to cause any --

Judge Elfvin's instructions to the jury, 7-20-77.

1 THE COURT: I know.

2 MR. COSTA: I didn't want to cause any ground
3 for mistrial or improper summation.
4 But the part I'm talking about in the
5 presence of the jury.

6 THE COURT: I understood.

7 MR. COSTA: But I think in my legal position
8 to you, your Honor, I think the proof
9 clearly demonstrates that aspect of
10 our position.

11 THE COURT: Again, I am refusing, and you
12 have an exception.

13 MR. COSTA: Thank you, your Honor.

14 I also ask your Honor to charge
15 that the Government's failure to make
16 appropriate disclosure of facts perculiar-
17 ly within its knowledge and necessary
18 for a fair appraisal of the informant's
19 part in any claimed inducement may
20 preclude a reasonable inquiry on the
21 part of the jury on the issue of
22 entrapment.

23 THE COURT: Read that back to me, please.

24 MR. COSTA: I'll read it again.

25 THE COURT: No. She has it.

Judge Elfvin's instructions to the jury, 7-20-77.

1 MR. COSTA: I'm sorry, your Honor.

2

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4

(Last statement by Mr. Costa
read.)

5

6 THE COURT: No. I refuse it.

7 MR. COSTA: Note my exception, your Honor.

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Your Honor, I also ask you to
charge the evidence of the Defendant's
willingness to participate in a criminal
activity by itself is insufficient to
overcome the defense of entrapment.

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THE COURT: The rest of them, of course, I
was going to say that the run of my
refusals of your requests is really
based upon the fact that they have
been priorly been presented to me and
I priorly put them aside. Now, this
one is slightly different. I can't
see any basis in the law for saying
other than that willingness is another
word or means for expressing predisposi-
tion to the criminal act and, of
course, predisposition to engage in a
criminal act negates the defense of

Judge Elfvin's instructions to the jury, 7-20-77.

1 entrapment so I will deny it.

2 MR. COSTA: Well, it is our position that this
3 is just one of the elements in the
4 totality of the prerequisite to go
5 into the concept of entrapment. Not
6 only is it willingness but you have
7 got to show predisposition --

8 THE COURT: I am saying --

9 MR. COSTA: And prior criminal activity.

10 THE COURT: I can't in my mind see a substantial
11 difference, if any difference, between
12 willingness and predisposition to
13 commit.

14 MR. COSTA: All right. I respectfully except,
15 your Honor.

16 I also ask your Honor to charge
17 where the undisputed evidence shows
18 that the Government supplied the
19 contraband, the receipt of which is
20 illegal, constitutes entrapment as a
21 matter of law and that the Government
22 cannot be permitted to punish the
23 person receiving it.

24 THE COURT: Well, I refuse that. I considered
25 that same one.

Judge Elfvin's instructions to the jury, 7-20-77.

1 MR. COSTA: And I also ask your Honor to
2 charge that the Government's misconduct -
3 that Government misconduct is a valid
4 defense of the indictment separate and
5 distinct from entrapment.

6 THE COURT: I will refuse that. I have
7 considered that before too and I think
8 I expressed --

9 MR. COSTA: This is for the record, your
10 Honor.

11 THE COURT: I understand.

12 MR. COSTA: I understand.

13 THE COURT: You must put these exceptions
14 on the record.

15 MR. COSTA: I know.

16 THE COURT: Now, in refusing it, as I indicated
17 earlier that I would, it's really also
18 my firm conclusion that finding a
19 Defendant not guilty because of police
20 misconduct is not a function of the
21 jury nor a matter that it should be
22 concerned with but is something that
23 in appropriate circumstances would
24 provoke the Court to instruct the jury
25 to acquit or usually it's been invoked

Judge Elfvin's instructions to the jury, 7-20-77.

1 on quite often, it's been invoked on
2 appeal and, of course, they would
3 reverse an acquittal. But, anyway,
4 I refuse.

5 MR. COSTA: Note my exception, your Honor.

6 THE COURT: All right.

7 Bring the jury back in.

8
9 (Jury present.)

10
11 THE COURT: You don't have to take your seats,
12 ladies and gentlemen. Just come into
13 the room.

14 Swear the Deputy Marshall, Mr.
15 Walsh.

16 CLERK: Yes, sir.

17
18 (Two Deputy Marshalls were duly
19 sworn.)

20
21 THE COURT: Ladies and gentlemen, with the
22 exception of Mr. Jurecki you will go
23 at this time with the Deputy Marshall.
24 We will send the exhibits to you just
25 as quickly as we can. You will have

**Selected portion of Judge Elfvin's discussion with
the jury during deliberations, 7-20-77.**

Selected portion of Judge Elfvin's discussion with
the jury during deliberations, 7-20-77.

1 think he would. I don't think --
2 THE COURT: You talked with him at five-fifteen
3 approximately, at that time he was set
4 to leave his home which is in Depew?
5 MR. COSTA: Right.
6 THE COURT: He should be here momentarily.
7 MR. COSTA: I would think so.
8
9 (Defendant present, 6:06 p.m.)
10
11 (Jury present.)
12
13 THE COURT: Who is speaking for the jury?
14 FOREMAN: I am, your Honor.
15 THE COURT: All right. Mr. McCabe, I have a
16 note, I read it into the transcript,
17 I will read it again, I read it into
18 the record rather, it says, "Transcripts
19 of testimony between Jones, Petronella
20 on 2-25-77 requested". There is some
21 confusion in my mind because Jones, of
22 course, gave testimony here in the trial,
23 Petronella gave testimony here in the
24 trial about the events on the 25th.
25 In due course the Stenographer in the

Selected portion of Judge Elfvin's discussion with
the jury during deliberations, 7-20-77.

1 court room would generate a transcript
2 of that and, of course, there is no
3 transcript in being. Of course, the
4 only transcript we have are the trans-
5 cripts you held in your hand while you
6 were listening to the respective tape
7 recordings. I am not sure whether you
8 want the transcript of the tape record-
9 ing which relates to the 25th or
10 whether you want the testimony read
11 back that Mr. Jones gave and Mr.
12 Petronella gave concerning what happened
13 on the 25th.

14 FOREMAN:

We would like to go over the
transcript of the tape that we viewed
earlier.

17 THE COURT:

All right. Now, the tape recording
itself then, as I indicated to you,
is the evidence and the transcript
is sort of a program and so what we
will do is we will set up the machinery
for a replaying to you of the tape of
February 25, 1977 and again place in
you hands the transcripts with the same
admonition I gave you before --

Edna J. Paczynski

OFFICIAL REPORTER, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE BY MAIL

USA vs. RAY Jones

77-1424

State of New York)
County of Genesee)
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age and
an employee of the Batavia Times Publishing Company,
Batavia, New York.

On the 5th day of January, 19 78
I mailed copies of a printed APPENDIX in
the above case, in a sealed, postpaid wrapper, to:

10 Copies to A. Daniel Fusaro, Clerk
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2 Copies to Peter Costa Esq.
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The package was mailed at about 4:00 P. M. on said
date at the request of:

Richard J. Arcara Esq., U. S. Attorney, 502 U. S.

Courthouse, Buffalo, NY 14202 Att: Edward J. Wagner Esq.

Asst. U. S. Attorney

Leslie R. Johnson

Sworn to before me this
5th day of January, 19 78

Patricia A. Lacey

PATRICIA A. LACEY

NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

1

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